Supreme Court, U. S.
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APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX.

CIVIL DOCKET
UNITED STATES DISTRICT COURT
73-2272-HP

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18, Plaintiffs, vs. CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILIPS [sic], Defendants.

(Docket Entry, United States District Court, Central District of California.)

COMPLAINT (CLASS ACTION)—ALLEGED VIOLATION OF CIVIL RIGHTS.

9/26/73 Fld. Complt. Fld request & ord (KH) for service of process by other than U.S. Marshal naming J. Earle Norris. Issd summs. Md. JS-5.

United States District Court, Central District of California.

Motion to Dismiss First Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted;

Notice of Motion; and

Memorandum of Points and Authorities in Support of Motion to Dismiss.

Marie Manhart, Carolyn Mayshack, Margerie Stoop, Alice F. Muller and Ethel L. Lehman, individually and on behalf of all other persons similarly situated; Committee to Protect Women's Retirement Benefits; and International Brotherhood of Electrical Workers, Local Union No. 18, Plaintiffs, vs. City of Los Angeles, Department of Water and Power, a body corporate and politic; Members of the Board of Water and Power Commissioners of the Department of Water and Power, City of Los Angeles; Members of the Board of Administration of the Department of Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan; Henry G. Bodkin, Jr.; Katherine B. Dunlap; Burton J. Gindler; Michael Glazer; Herbert C. Ward; Louis J. Weidner, Jr.; Ralph E. Powell; Leo W. Sudmeier, Jr.; William D. Sachau; and Robert V. Phillips, Defendants. Civil Action No. 73-2272-HP.

Filed: Nov. 21, 1973.

Defendants herein move the Court as follows:

1. To dismiss the action because the first amended complaint fails to state a claim upon which relief can be granted under the Civil Rights Act, 42 U.S.C. §1983 and therefore jurisdiction of this Court cannot be invoked under 28 U.S.C. §1343(3).

2. To dismiss the action because the first amended complaint fails to state a claim upon which relief can be granted under Federal law with respect to the named members of the Board of Commissioners and the Board of Administration.

3. To dismiss the action because the first amended complaint fails to state a claim upon which relief can be granted assuming arguendo that plaintiffs could state a cause of action with respect to the Civil Rights Act, 42 U.S.C. §1983, and the Federal Constitution, it is nevertheless barred by the Statute of Limitations as to that portion which accrued more than three years prior to the filing of the action herein seeking monetary relief.

4. To dismiss the action since plaintiffs have failed to allege that they have exhausted their administrative remedies, the Court lacks subject matter jurisdiction under the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq. and therefore the first amended complaint fails to state a claim upon which relief can be granted.

5. To dismiss the action because the first amended complaint fails to state a claim upon which relief can be granted with respect to the recovery of any damages or the granting of any other relief prior to the effective date of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq.

6. To dismiss the action because the first amended complaint fails to state a claim upon which relief

can be granted with respect to alleged causes of actions under the Constitution of the State of California.

DATED: November 21, 1973.

BURT PINES, City Attorney

EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power

MADELEINE I. FLIER, Deputy City Attorney

GILBERT W. LEE, Deputy City Attorney

By /s/ Madeleine I. Flier

MADELEINE I. FLIER

Deputy City Attorney

111 No. Hope Street

P.O. Box 111

Los Angeles, California 90051

United States District Court, Central District of California.

Civil Minutes—General.

Case No.: 73-2272-HP.

Date: 1/25/74.

Title: Marie Manhart et al v. City of Los Angeles etc et al.

DOCKET ENTRY: Ent Proc: Hrg deft mot to dismiss, mot granted in part, denied in part. Court decides 3 year statute of limitation applies. Pltf mot for rule 23, class action, determination granted with certain qualifications ordered by the court. Couns to cooperate on preparation of order to submit tor court signature. Pltf to file amended complaint. (HP)

PRESENT: Hon. Harry Pregerson, JUDGE; R. W. Johnson, Deputy Clerk; Charles Bell, Court Reporter.

ATTORNEYS PRESENT FOR PLAINTIFFS: Robert M. Dohrmann; Barbara Miller.

ATTORNEYS PRESENT FOR DEFENDANTS: Madeleine I. Flier, Gilbert W. Lee, Bob Ferm.

PROCEEDINGS: HEARING DEFENDANTS MOTION TO DISMISS; PLAINTIFFS RULE 23 MOTION.

Defendants motion to dismiss granted in part, denied in part.

Plaintiffs class action motion granted with certain qualifications.

Plaintiff to file amended complaint.

Counsel to prepare and submit proposed order for courts signature.

United States District Court, Central District of California.

Order Granting in Part and Denying in Part Defendants' Motion to Dismiss.

[Title Omitted in Printing]

Filed: March 26, 1974.

Defendants' Motion to Dismiss having come on regularly before the Court for hearing, and the Court having considered the various memoranda of law, affidavits and exhibits submitted by the respective parties, and having heard oral argument by the respective parties,

IT IS HEREBY ORDERED:

1. That the following defendants, CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN, and in their representative capacities, HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS, are not "persons" within the meaning of the Civil Rights Act, 42 U.S.C., Section 1983. Defendants' Motion to Dismiss with respect to these defendants is hereby granted.

2. That the following defendants, HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR., RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS, in their individual capacities, are "persons" within the meaning of the Civil Rights Act, 42 U.S.C., Section 1983. Defendants' Motion to Dismiss with respect to these defendants, in their individual capacities, is hereby denied.

3. That the establishment of pension contribution rates is not a quasi-legislative act but is an administrative act, and the following defendants, HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS, in their individual capacities, are not entitled to official immunity under the Civil Rights Act, 42 U.S.C., Section 1983. Defendants' Motion to Dismiss on this ground with respect to these individuals is hereby denied.

4. That defendants' Motion to Dismiss is hereby granted with respect to any purported cause of action under 42 U.S.C., Section 1983, which accrued more than three years prior to the filing of the Complaint herein (September 26, 1973).

5. That plaintiffs' allegation of compliance with the procedural requirements of the Equal Employment Opportunity Act of 1972, 42 U.S.C., Section 2000e, et seq., is sufficient. Defendants' Motion to Dismiss on this ground is hereby denied.

6. That defendants' Motion to Dismiss is hereby granted with respect to any purported cause of action under the Equal Employment Opportunity Act of 1972, 42 U.S.C., Section 2000e, et seq, prior to March 24, 1972.

7. That plaintiffs failed to state a cause of action under the Constitution of the State of California, Article 1, Sections 1 and 21, for money or damages in that defendants are immune from liability for the performance of discretionary acts under the California Government Code. Defendants' Motion to Dismiss as to this purported cause of action is hereby granted.

8. That plaintiffs failed to allege compliance with the California Claims Act. Defendants' Motion to Dismiss is hereby granted with respect to the purported cause of action founded upon Article 1, Sections 1 and 21 of the Constitution of the State of California for money or damages. Plaintiffs are hereby granted leave to amend their complaint to allege compliance with the California Claims Act.

9. That plaintiffs have twenty days from the effective date of this Order in which to file a Second Amended Complaint.

DATED: Mar. 26, 1974.

/s/ Harry Pregerson
HARRY PREGERSON
UNITED STATES DISTRICT JUDGE

PRESENTED BY:
BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant
City Attorney for Water and Power
MADELEINE I. FLIER, Deputy City Attorney
GILBERT W. LEE, Deputy City Attorney
/s/ By Madeleine I. Flier
MADELEINE I. FLIER
Attorneys for Defendants

APPROVED AS TO FORM AND SUBSTANCE:
KATHERINE STOLL BURNS
ROBERT M. DOHRMANN
BARBARA E. MILLER
SCHWARTZ, STEINSAPIR & DOHRMANN
/s/ By Robert M. Dohrmann
ROBERT M. DOHRMANN
Attorneys for Plaintiffs

United States District Court, Central District of California.

Second Amended Complaint for Declaratory and Injunctive Relief, Back Pay, Credit and Other Appropriate Relief Under the Provisions of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, as Amended March 24, 1972, the Civil Rights Act of 1871, 42 U.S.C. §1983, the Fourteenth Amendment of the Constitution of the United States, and Article 1, §§1 and 21 of the Constitution of the State of California.

[Title Omitted in Printing]

Filed: July 18, 1974.

Count I
Cause of Action Under Title VII

1. The jurisdiction of this Court to grant injunctive and declaratory equitable relief as well as damages is invoked pursuant to Section 706(f) and (g) of the Equal Employment Opportunity Act of 1972, effective on March 24, 1972, amending Title VII of the Civil Rights Act of 1964, and pursuant to 42 U.S.C. §§1331, 1343(3) and (4), 2201 and 2202.

2. On or about June 5, 1973, the plaintiff INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18 (hereinafter "IBEW") filed Charges with the Equal Employment Opportunity Commission, pursuant to Section 706 of Title VII, alleging acts of discrimination solely on the basis of sex. Plaintiff IBEW demanded and received from the Equal Employment Opportunity Commission, by letter dated September 17, 1973, statutory notice, pursuant to Section 706 of the Act, informing the plaintiff, among other things, of the plaintiff's right

to proceed in Court under Section 706(f) of Title VII. As of the date of the filing of this Second Amended Complaint, there has been no attempt at conciliation between the plaintiffs and the defendants, nor is such attempt at conciliation a prerequisite to bringing a civil action in this Court.

3. The plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is composed of all female employees who are presently working for the defendant DEPARTMENT OF WATER AND POWER (hereinafter "Department") who are members of the Department's Employees' Retirement, Disability, and Death Benefit Insurance Plan (hereinafter "Plan"), all female members of the Plan who retired from the active service of the Department on or after March 24, 1972, all females who resigned from the active service of the Department on or after March 24, 1972 who left contributions on deposit with the Plan, and all females who will become employees of the Department and members of the Plan in the future. The members of this class, consisting of over 2,500 women, are too numerous to be joined in one action.

4. The plaintiffs, MARIE MANHART, ALICE F. MULLER and COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS, have made repeated demands on all of the defendants to alter the sexually discriminatory Plan. The plaintiff IBEW filed a Charge of Sex Discrimination with the Equal Employment Opportunity Commission on behalf of all women discriminated against in the administration of the Plan. The claims of the named plaintiffs are typical of the claims of the other members of the class, the interests of

whom they can diligently, fairly and adequately represent.

5. The Plan requires women to contribute a higher percentage of their salaries in order to receive retirement benefits somewhat similar to benefits received by males. The Plan fails adequately to compensate resigned and retired members of the class for the higher percentage of their salaries which they contributed to the Plan. The question of law common to the class is whether the Plan violates the civil rights protected by Title VII.

6. The defendants have acted, or refused to act, on grounds generally applicable to the class, in that they maintain a sexually discriminatory retirement system, thereby making appropriate relief with respect to the class as a whole.

7. The plaintiff MARIE MANHART, who has recently retired, personally contributed from 1950 to the present nearly $6,000.00 more to the Plan than did her male counterpart. She is informed, and believes, and on this basis alleges, that such money will not be returned to her during her period of retirement.

8. The plaintiff CAROLYN MAYSHACK, a black woman who began working for the Department in May of 1956, now works in its Commercial Division. She provides the sole financial support for two young children, and she and they have been, and presently are being, deprived of some of the necessities of life due to the sexually discriminatory financial burden the defendants have placed upon her in requiring her to contribute, as a condition of continued employment, greater retirement contributions to the Plan than they require of her male counterpart.

9. The plaintiff MARGERIE STOOP, who has been working for the defendants since she was nineteen years of age in 1938, and who now works in their Personnel Division, paid more money to the Plan through August 1, 1973 than did her husband, also an employee of the Department, although his salary was greater than hers. She is informed, believes, and on this basis alleges, that she will not recover the financial loss she has suffered due to the defendants' sexually discriminatory conduct.

10. The plaintiff ALICE F. MULLER, a member of the IBEW, who works in the Power Construction Designing Division of the Department, has paid proportionately more than her male counterpart to the Plan since 1942. She is informed, believes, and on this basis alleges, that absent the assistance of this Court, she will never recover the financial loss which she has suffered, and continues to suffer, because of the defendants' refusal to alter or remedy the Plan.

11. The plaintiff ETHEL H. LEHMAN, a black woman working in the Department's Accounting Division, has been employed for nearly twenty-nine years and has paid, and presently continues to pay, unfair sums into the Plan. She is informed, believes, and on this basis alleges, that the discriminatory practices of the defendants will not cease and she will not be compensated for her losses without the assistance of this Court.

12. The plaintiff COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS (hereinafter "Committee") is an informal association whose members are high ranking supervisory employees of the Department. The Committee's members have suffered and continue to suffer pecuniary loss due to the defendant's

discriminatory Plan. In addition to their personal loss, the members of the Committee feel that, due to their status, they owe a duty to protect the civil rights of the female employees under their supervision.

13. The plaintiff IBEW is an unincorporated labor organization with female members who have worked and are working for the Department and have suffered and continue to suffer pecuniary loss due to the defendant's discriminatory Plan.

14. All the named plaintiffs, the Committee, and the IBEW members of the class are working or have worked for the Department in the City of Los Angeles, State of California, within the Central District of California, and the unlawful employment practices alleged herein were and are being committed within the territorial jurisdiction of this Court.

15. All members of the class who have been, are, or will be employed by the Department have suffered, are suffering, or will suffer from unlawful employment practices committed by the defendants within the territorial jurisdiction of this Court.

16. The Department presently has 12,000 employees, approximately 2,063 of whom are women. Pursuant to Article XXII, Section 220.1 of the Charter of the City of Los Angeles, the Department is empowered to establish and maintain the Plan herein under attack. The Department is an employer within the meaning of Section 701(b) of Title VII, as amended effective March 24, 1972.

17. The defendant BOARD OF COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, created by Article VI, Section 70 of the Charter of the City of Los Angeles, is responsible,

according to Article XXII, Section 220.1(1)(a) of the Charter, for approving and directing the practices of the defendant BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER PUBLIC EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN (hereinafter "Board of Administration") and is therefore an employer or agent of an employer within the meaning of Title VII.

18. The defendant Board of Administration created by Article XXII, Section 220.1(1)(e) of the City Charter, is an agent of an employer within the meaning of Title VII.

19. The defendants HENRY G. BODKIN, JR., KATHERINE B. DUNLAP, BURTON J. GINDLER, MICHAEL GLAZER and HERBERT C. WARD are members of the Board of Commissioners of the Department of Water and Power.

20. The defendants HENRY G. BODKIN, JR., KATHERINE B. DUNLAP, LOUIS F. WEIDNER, JR., RALPH E. POWELL, LEO W. SUDMEIER, JR., WILLIAM D. SACHAU and ROBERT V. PHILIPS [sic] are members of the Board of Administration.

21. All of the defendants, including the individuals, both in their personal and representative capacities, are and at all times pertinent herein have been agents of each other. They have authorized and allowed perpetuation of the sexually discriminatory Plan, thereby contravening the civil rights of the plaintiffs.

22. With respect to the contribution rates required of men and women, the Plan invidiously discriminates against women by arbitrarily requiring higher contribution rates for women. The higher contribution rates are supposedly based on the greater longevity of women.

The plaintiffs allege that there is no criterion, be it longevity or anything else, which lawfully authorizes the discrimination complained of herein.

23. The plaintiffs are informed, believe, and on this basis allege, that the longevity factors utilized by the defendants are based on old statistics which fail to consider the longevity of working women as compared to working men.

24. The Plan's provisions for surviving spouses, which allows such spouses to continue to receive benefits, have an unlawful differential impact on male and female employees. Contributions of female employees which have been and are used to fund this provision of the Plan were and are an undue financial hardship on the female employees. The plaintiffs are informed, believe, and on this basis allege, that under these provisions of the Plan, 671 persons are collecting survivorship benefits, only 3 of whom are spouses of deceased female employees.

25. The Plan is a condition of employment in the Department.

26. As a result of the defendants' continuing sexual discrimination, the plaintiffs are presently suffering an exhorbitant [sic] financial loss, in an amount to be established by proof. The plaintiffs will seek leave of the Court to amend the Complaint when the amount of damages is established, but they now are informed, believe, and on this basis allege, that the amount is in excess of $2,000,000.00.

27. In addition to the actual losses directly attributable to the discriminatory Plan itself, the named plaintiffs, irrespective of their attorneys' time, have spent time and money valued at at least $25,000.00 in order

to persuade, convince or compel the defendants to cease their pattern and practice of sexual discrimination.

28. In the past, the defendants followed a practice of discriminating in respect to retirement ages for men and women. For the purported privilege of being forced to retire at age sixty-two, three years earlier than males were forced to retire, combined with a higher penalty for women for exercising an early retirement option, women were discriminated against by the defendants from 1938 through 1970. For this supposed benefit, which many plaintiffs did not want and did not elect to exercise, some of the plaintiffs paid between 45% and 46% more into the Plan than did their male counterparts. Between 1970 and April of 1972, depending on their ages of entry into the Department's employ and their age when participation in the Plan began, women continued to pay more. If a woman began working at age 20, she paid approximately 24½% more into the Plan than was required of a man; a 30-year-old woman paid approximately 29% more; and a 40-year-old woman paid approximately 31½% more. In April of 1972, in large part in response to an adverse judicial ruling, the defendants equalized retirement ages for men and women. However, the defendants made no attempt to reimburse or compensate, through credit or additional pensions, victims of past discrimination for the excessive salary deductions taken in the past. Therefore, in addition to continuing to pay nearly 15% more at the present time than their male counterparts pay, women are effectively being discriminated against at the present time for the failure of the defendants to make adjustments to eliminate the present effects of past discrimination.

Count II

Cause of Action Under 42 U.S.C. §1983

29. The jurisdiction of this Court to grant injunctive and declaratory equitable relief as well as damages is invoked pursuant to 42 U.S.C. §§1331, 1343(3) and (4), 2201 and 2202.

30. Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24, 25, 26, 27 and 28 are incorporated herein by reference.

31. The plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is composed of all female employees who are presently working for the Department who are members of the Plan, all female members of the Plan who retired from the active service of the Department on or after September 26, 1970, all females who resigned from the active service of the Department on or after September 26, 1970 who left contributions on deposit with the Plan, and all females who will become employees of the Department and members of the Plan in the future. The members of this class, consisting of over 2,500 women, are too numerous to be joined in one action.

32. The plaintiffs MARIE MANHART, ALICE F. MULLER and the COMMITTEE have made repeated demands on all of the defendants to alter the sexually discriminatory Plan. The claims of the named plaintiffs are typical of the claims of the other members of the class, the interests of whom they can diligently, fairly and adequately represent.

33. The Plan requires women to contribute a higher percentage of their salaries in order to receive retirement benefits somewhat similar to benefits received by males.

The Plan fails adequately to compensate resigned and retired members of the class for the higher percentage of their salaries which they contributed to the Plan. The question of law common to the class is whether the Plan violates the civil rights protected by 42 U.S.C. §1983.

34. The Department presently has 12,000 employees, approximately 2,063 of whom are women. Pursuant to Article XXII, Section 220.1 of the Charter of the City of Los Angeles, the Department is empowered to establish and maintain the Plan herein under attack.

35. The Board of Commissioners of the Department of Water and Power, created by Article VI, Section 70 of the Charter of the City of Los Angeles, is responsible, according to Article XXII, Section 220.1 (1)(a) of the Charter, for approving and directing the practices of the Board of Administration.

36. The plaintiffs are informed, believe and on this basis allege that at all times during their tenure in their respective offices as alleged in Paragraphs 19 and 20, all of the defendants have been agents of one another.

37. The plaintiffs are informed, believe and on this basis allege that at all times during their tenure in their respective offices as alleged in Paragraphs 19 and 20, all of the defendants knew of those provisions of the Plan alleged herein, and the defendants knew that such provisions discriminated against women by reason of their sex.

38. The plaintiffs are informed, believe and on this basis allege that at all times during their tenure in their respective offices as alleged in Paragraphs 19 and 20, all of the defendants had reason to know

of those provisions of the Plan alleged herein, and the defendants had reason to know that such provisions discriminated against women by reason of their sex.

39. The plaintiffs are informed, believe and on this basis allege that at all times during their tenure in their respective offices as alleged in Paragraphs 19 and 20, the defendants had authority and power to amend the Plan and eliminate its discrimination against women.

40. The plaintiffs are informed, believe and on this basis allege that the defendants, in performing all of the acts alleged herein, believed that they were acting within the scope of their authority and within and pursuant to the laws of the State of California and of the United States.

Count III

Cause of Action Under the Fourteenth Amendment of the Constitution of the United States

41. The jurisdiction of this Court to grant injunctive and declaratory relief is invoked pursuant to 42 U.S.C. §§1331, 1343(3), 2201 and 2202.

42. Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 34 and 35 are incorporated herein by reference.

43. The Plan requires women to contribute a higher percentage of their salaries in order to receive retirement benefits somewhat similar to benefits received by males. The Plan fails adequately to compensate resigned and retired members of the class for the higher percentage of their salaries which they contributed to the Plan. The question of law common to the class is whether the Plan violates the equal protection of the laws

as guaranteed to plaintiffs by the Fourteenth Amendment of the Constitution of the United States.

44. The defendant Board of Administration was created by Article XXII, Section 220.1(1)(e) of the City Charter.

Count IV

Cause of Action Under Article 1, §§ 1 and 21 of the Constitution of the State of California

45. The pendant jurisdiction of this Court to grant injunctive and declaratory relief under Article 1, §§1 and 21 of the Constitution of the State of California is hereby invoked.

46. Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 34, 35 and 44 are incorporated herein by reference.

47. The Plan requires women to contribute a higher percentage of their salaries in order to receive retirement benefits somewhat similar to benefits received by males. The Plan fails adequately to compensate resigned and retired members of the class for the higher percentage of their salaries which they contributed to the Plan. The question of law common to the class is whether the Plan violates the rights protected by Article 1, §§ 1 and 21 of the Constitution of the State of California.

WHEREFORE, the plaintiffs respectfully request that this Court:

1. Rule that the present matter is properly maintained as a class action;

2. Enter a judgment declaring that the acts and practices of the defendants are in violation of the laws and Constitution of the United States, of the Constitution of the State of California, or both;

3. Issue a permanent injunction:

(a) Ordering the defendants to amend the Plan so that contribution rates for males and females are the same;

(b) Ordering the defendants to pay the plaintiffs the amount of money they have contributed in excess of their counterpart male employees due to the defendants' discriminatory Plan; or as an alternative to (b),

(c) Ordering the defendants to credit the accounts of the plaintiffs, such credit to be used for:

(i) An increased retirement allowance, or

(ii) Cessation of contributions until such credit has been exhausted for those plaintiffs who are still employed;

(d) Ordering the defendants to pay the plaintiffs for the time and money expended in their futile efforts to persuade the defendants to comply with the law;

4. Retain jurisdiction over this action and order the defendants to report periodically to the appropriate authority on the defendants' progress in compliance with the terms of this Court's order;

5. Award the plaintiffs the costs of this action together with attorney's fees as is appropriate in civil rights actions and as is specifically provided for in Section 706(k) of the Civil Rights Act of 1964, as amended; and

6. Grant the plaintiffs and the class they represent such other and further relief as may be necessary and proper.

DATED: July 10, 1974.

KATHERINE STOLL BURNS
ROBERT M. DOHRMANN
MICHAEL EVAN GOLD
Schwartz, Steinsapir & Dohrmann

/s/ By Katherine Stoll Burns
KATHERINE STOLL BURNS

/s/ By Michael Evan Gold
MICHAEL EVAN GOLD
Attorneys for Plaintiffs

[Affidavit of Service Omitted in Printing]

United States District Court, Central District of California.

Answer to Second Amended Complaint.

[Title Omitted in Printing]

Filed: Aug. 9, 1974.

Defendants, answering the Second Amended Complaint on file herein, admit, deny and allege as follows:

COUNT I

CAUSE OF ACTION UNDER TITLE VII

1. In answer to the allegations of paragraphs 1, 5, 6, 7, 15, 17, 18, 21, 22, 23, 24, 26 and 28, defendants deny, generally and specifically, each and every allegation contained therein.

2. In answer to the allegations of paragraph 2, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege on or about June 5, 1973, the plaintiff INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18, filed a Charge with the Equal Employment Opportunity Commission, alleging acts of discrimination on the basis of sex. There has been no attempt at conciliation between the plaintiffs and the defendants.

3. In answer to the allegations of paragraph 3, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege with respect to this cause of action, the class includes all female employees presently working for the Department of Water and Power who are members of the Retirement Plan; all female members of the Plan who retired from the active service

of the Department of Water and Power on or after March 24, 1972; and all females who resigned from the active service of the Department of Water and Power on or after March 24, 1972 who left contributions to the Water and Power Retirement Plan on deposit.

4. In answer to the allegations of paragraph 4, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that some female Department employees have requested that the contribution rates set forth in the Plan be amended.

5. In answer to the allegations of paragraph 8, beginning with the words "The plaintiff CAROLYN MAYSHACK" and ending with the words "Commercial Division", defendants admit the allegations contained therein. In answer to the allegations of paragraph 8, beginning with the words "She provides" and ending with the words "necessities of life", defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained therein. As to all other allegations of paragraph 8, defendants deny, generally and specifically, each and every allegation contained therein.

6. In answer to the allegations of paragraph 9, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that Margerie Stoop, who commenced employment with the Department July 25, 1938 at nineteen and one-half years of age, and who now works in Industrial Relations, contributed more to the

Retirement Fund than her husband, a retired Department employee, and that said plaintiff has not and does not now suffer any loss due to defendants' conduct and that defendants have not and do not now engage in any sexually discriminatory conduct.

7. In answer to the allegations of paragraph 10, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that plaintiff Alice Muller, who works in the Power Design and Construction Division of the Department has contributed more to the Retirement Fund than a male counterpart would have contributed, and that said plaintiff has not and does not now suffer any financial loss as a result of defendants' refusal to alter the Plan or as a result of any other conduct of defendants.

8. In answer to the allegations of paragraph 11, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that Ethel H. Lehman, a Black woman working in the Department's Accounting Division, has been employed for approximately twenty six and one-half years, and that said plaintiff has not, and does not now suffer any loss as a result of defendants' practices, and that the defendants have not and do not now engage in discriminatory practices.

9. In answer to the allegations of paragraph 12, beginning with the words "The plaintiff COMMITTEE" and ending with the words "the Department", defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained

therein. As to all other allegations of paragraph 12, defendants deny, generally and specifically, each and every allegation contained therein.

10. In answer to the allegations of paragraph 13, beginning with the words "The plaintiff IBEW" and ending with the words "working for the Department", defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained therein. As to all other allegations of paragraph 13, defendants deny, generally and specifically, each and every allegation contained therein.

11. In answer to the allegations of paragraph 14, beginning with the words "All the named plaintiffs" and ending with the words "District of California," defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained therein. As to all other allegations of paragraph 14, defendants deny, generally and specifically, each and every allegation contained therein.

12. In answer to the allegations of paragraph 16, beginning with the words "The Department presently" and ending with the words "are women", defendants deny, generally and specifically, each and every allegation contained therein.

13. In answer to the allegations of paragraph 19, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege Burton J. Gindler, Herbert C. Ward, Michael Glazer, George H. Kennedy and

Patricia C. Nagle are members of the Board of Water and Power Commissioners.

14. In answer to the allegations of paragraph 20, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege Burton J. Gindler, Herbert C. Ward, Louis F. Weidner, Jr., Ralph E. Powell, Leo W. Sudmeier Jr., William D. Sachau and Robert V. Phillips are members of the Board of Administration.

15. In answer to the allegations of paragraph 27, defendants do not have information or belief on the subject sufficient to enable them to answer said allegations, and placing their denial on that ground, deny, generally and specifically, each and every allegation contained therein.

COUNT II

CAUSE OF ACTION UNDER 42 U.S.C. §1983

16. In answer to the allegations of paragraphs 29, 33, 35, 36, 37, 38, and 39, defendants deny generally and specifically, each and every allegation contained therein.

17. In answer to the allegations of paragraph 30, defendants incorporate their answers to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 22, 23, 24, 26, 27 and 28 inclusive, as though fully set forth herein.

18. In answer to the allegations of paragraph 31, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege with respect to this cause of action, the class includes all female employees presently working for the Department of Water and Power

who are members of the Retirement Plan; all female members of the Plan who retired from the active service of the Department of Water and Power on or after September 26, 1970; and all females who resigned from the active service of the Department of Water and Power on or after September 26, 1970 who left contributions to the Water and Power Retirement Plan on deposit.

19. In answer to the allegations of paragraph 32, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that some female Department employees have requested that the contribution rates set forth in the Plan be amended.

20. In answer to the allegations of paragraph 34, defendants deny, generally and specifically, each and every allegation contained therein, and in connection with said denial, allege that Section 220.1 of the Los Angeles City Charter provides in part:

> "The Department of Water and Power shall also have the power and duty:
>
> (1) To establish and maintain within said Department a general plan and system of retirement, disability, and death benefits, and, in cooperation with its eligible and participating employees, to provide currently out of the Water Revenue Fund and the Power Revenue Fund a portion of the cost under said plan and system, including expenses incident to the administration thereof, subject, however, to the following provisions, to-wit:"

21. In answer to the allegations of paragraph 40, defendants deny, generally and specifically, each and every allegation contained therein, and in connection

with said denial allege that at all times herein defendants acted and continue to act in good faith and in compliance with all federal and state laws applicable thereto.

COUNT III

CAUSE OF ACTION UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

22. In answer to the allegations of paragraphs 41 and 43, defendants deny, generally and specifically, each and every allegation contained therein.

23. In answer to the allegations of paragraph 42, defendants incorporate their answers to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 26, 27, 28, 31, 32, 34 and 35 inclusive, as though fully set forth herein.

COUNT IV

CAUSE OF ACTION UNDER ARTICLE I, §§1 and 21 OF THE CONSTITUTION OF THE STATE OF CALIFORNIA

24. In answer to the allegations of paragraphs 45 and 47, defendants deny, generally and specifically, each and every allegation contained therein.

25. In answer to the allegations of paragraph 46, defendants incorporate their answers to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 26, 27, 28, 31, 32, 34 and 35 inclusive, as though fully set forth herein.

AS A FIRST, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE, DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under the

Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e et seq. (hereinafter "EEOA").

AS A SECOND, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That plaintiffs failed to exhaust the administrative remedies which are provided under the EEOA.

AS A THIRD, SEPARATE
AND DISTINCT AFFIRMATIVE
DEFENSE, DEFENDANTS ALLEGE:

That the class cannot be properly maintained under the EEOA to include those individuals on whose behalf no charges were filed with the Equal Employment Opportunity Commission.

AS A FOURTH, SEPARATE
AND DISTINCT AFFIRMATIVE
DEFENSE, DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted with respect to the recovery of any money or damages or any other relief prior to March 24, 1972—the effective date of the EEOA.

AS A FIFTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the defendants may use different mortality tables with respect to male and female members of the Retirement Plan pursuant to a bona fide occupational qualification.

AS A SIXTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under the Civil Rights Act, 42 U.S.C. §1983.

AS A SEVENTH, SEPARATE,
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. §1983 with respect to the named members of the Board of Commissioners and the Board of Administration in their individual capacities.

AS AN EIGHTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the members of the Board of Commissioners and the Board of Administration are immune from Civil Rights actions under 42 U.S.C. §1983.

AS A NINTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the individual members of the Board of Commissioners and Board of Administration have acted and continue to act in good faith at all times herein.

AS A TENTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That plaintiffs are barred by the California Statute of Limitations from the recovery of any money or

damages or any other relief prior to September 26, 1970 under either the Civil Rights Act, 42 U.S.C. §1983 or the Fourteenth Amendment to the United States Constitution.

AS AN ELEVENTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under the Fourteenth Amendment to the United States Constitution.

AS A TWELFTH, SEPARATE
AND DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Second Amended Complaint fails to state a claim upon which relief can be granted under Article 1, Sections 1 and 21 of the Constitution of the State of California.

AS A THIRTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That failure to allege compliance with the California Claims Act and the Charter of The City of Los Angeles bars the maintenance of a suit against defendants for money or damages.

AS A FOURTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the individually named members of the Board of Commissioners and the Board of Administration

are not liable under Article 1, Sections 1 and 21 of the Constitution of the State of California for their discretionary acts.

AS A FIFTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the provisions of the Retirement Plan of which plaintiffs complain constitute part of their contract of employment with the Department of Water and Power by which they and the Department are both bound.

AS A SIXTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That the Retirement Plan is designed to provide equal retirement benefits to its members.

AS A SEVENTEENTH, SEPARATE AND
DISTINCT AFFIRMATIVE DEFENSE,
DEFENDANTS ALLEGE:

That plaintiffs are barred by the equitable doctrines of laches and estoppel from recovery of any relief in the action herein.

WHEREFORE, defendants pray:

1. That plaintiffs take nothing by this action;

2. That defendants be dismissed and recover their costs in this action; and

3. That defendants be granted such other and further relief as the Court may deem proper, including defendants' reasonable attorneys' fees.

DATED: August 9, 1974.

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power
GILBERT W. LEE, Deputy City Attorney

/s/ By Gilbert W. Lee
GILBERT W. LEE
Deputy City Attorney

111 No. Hope Street
P.O. Box 111
Los Angeles, California 90051

Attorneys for Defendants

[Affidavit of Service Omitted in Printing]

United States District Court, Central District of California.

Notice of Hearing on Motion by Plaintiffs for Preliminary Injunction.

[Title Omitted in Printing]

Filed: Sept. 6, 1974.

TO: CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL. AND TO THEIR ATTORNEYS, BURT PINES, CITY ATTORNEY, EDWARD C. FARRELL, CHIEF ASSISTANT, AND GILBERT W. LEE, DEPUTY CITY ATTORNEY:

PLEASE TAKE NOTICE that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the plaintiffs will move this Court, at Courtroom 17, United States Courthouse, 312 North Spring Street, Los Angeles, California, on Monday, September 23, 1974 at 10:00 a.m., or as soon thereafter as counsel may be heard, for a preliminary injunction requiring the defendants to equalize the contribution rates for male and female employees of the Department of Water and Power, based on the attached Statement of Reasons and Memorandum of Points and Authorities and the Affidavits of Walter L. Risse, Carolyn Mayshack, and Alice Muller.

Dated: September 6, 1976

KATHERINE STOLL BURNS
ROBERT M. DOHRMANN
MICHAEL EVAN GOLD
SCHWARTZ, STEINSAPIR & DOHRMANN

/s/ By M. Gold
MICHAEL EVAN GOLD
Attorneys for Plaintiffs

United States District Court, Central District of California.

Affidavit of Walter L. Risse in Support of Motion for Preliminary Injunction.

[Title Omitted in Printing]

Filed: Sept. 6, 1974.

State of California, County of Los Angels—ss.

Walter L. Risse, being duly sworn, deposes and says:

I am the business manager at the International Brotherhood of Electrical Workers, Local 18, an unincorporated labor organization with its principal place of business in Los Angeles, California. Approximately *4500* of our members are presently employed in the Department of Water and Power in Los Angeles, and approximately *1000* are retirants from the Department of Water and Power.

On or about June 5, 1973, I filed a charge with the Equal Employment Opportunity Commission, stating that the Department of Water and Power of Los Angeles. the Board of Water and Power Commissioners, the Board of Administration and the Administrator and the Secretary of the Department of Water and Power Employees' Retirement Disability and Death Benefit Plan were engaged in a pattern and practice of sex discrimination against the female employees of the Department of Water and Power. A true copy of that charge is attached to this Affidavit as Exhibit A and is incorporated herein by reference.

On September 17, 1973 or a few days thereafter, I received from the United States Department of Justice a Notice of Right to Sue within 90 days concerning

the charge of discrimination mentioned above. A true copy of that notice is attached to this Affidavit as Exhibit B and is incorporated herein by reference.

/s/ Walter L. Risse
WALTER L. RISSE

Subscribed and sworn to before me this 4th day of September, 1974.

/s/ Signature: Michael Evan Gold
Notary Public in and for
said County and State

[Seal]

EXHIBIT A.

CHARGE OF DISCRIMINATION

EXHIBIT A.

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

1. Your Name: International Brotherhood of Electrical Workers, Local Union No. 18; Phone Number: 387-8274; Street Address: 4189 West Second Avenue; City: Los Angeles; State: California; Zip Code: 90004.

2. Was the Discrimination Because of: Race or Color, No; Religious Creed, No; National Origin, No; Sex, Yes.

3. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all. Name: Department of Water & Power of the City of Los Angeles; Street address: 111 North Hope Street; City: Los Angeles; State: California; Zip Code: 90013; and (other parties if any) Board of Water and Power Commissioners, Board of Administration and the Administrator, Secretary of the Department of Water & Power's Retirement, Disability and Death Benefit Plan.

4. Have you filed this charge with a state or local government agency? No.

5. If your charge is against a company or a union, how many employees or members? Over 25.

6. The most recent date on which this discrimination took place: Month Continuing.

7. Explain what unfair thing was done to you. How were other persons treated differently? (use extra sheet if necessary.) The parties enumerated in No. 3 above have engaged in a pattern and practice of sex discrimination against all their female employees, including those women who are members of and are represented by IBEW, Local 18. Women are arbitrarily required to make contributions to and receive benefits from the Retirement, Disability and Death Benefit Plan which are not comparable to the contributions and benefits paid and received by male employees.

8. I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. Date: June 5, 1973; /s/ Walter L. Risse, Business Manager.

Subscribed and sworn to before me this 5th day of June 1973.

/s/ Sandra E. Abrahamian
Notary Public

EXHIBIT B.

United States Department of Justice
Washington, D.C. 20530

Notice of Right to Sue
Within 90 Days

Sept. 17, 1973

Mr. Walter L. Risse, Business Manager
IBEW Local No. 18
4189 West Second Avenue
Los Angeles, California 90004

Re: EEOC Charge Against City of Los Angeles Department of Water and Power
No. TLA 3-2123

Dear Mr. Risse:

Because your organization has filed a charge against the respondent(s) named above with the Equal Employment Opportunity Commission and the Commission has dismissed that charge, and no suit based on that charge has been filed by this Department, you are hereby notified that any person claiming to be aggrived [sic] has the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, against the above named respondent(s).

If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of

the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you may take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States Court in Los Angeles, California.

Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. That file is located in the EEOC District Office, at 1543 West Olympic Blvd., Suite 340, Los Angeles, California 90015.

We request that you send this Department a copy of any complaint initiating suit.

This notice should not be taken to mean that an agency of the United States has made a judgment as to whether or not your charge is meritorious.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

By: /s/ Douglas B. Huron
DOUGLAS B. HURON
Attorney
Employment Section

cc: Mr. Lorenzo H. Traylor, Director
EEOC District Office
1543 West Olympic Blvd., Suite 340
Los Angeles, California 90015

Mr. Robert Dohrmann, Esquire
Schwartz, Steinsapir & Dohrmann
6404 Wilshire Blvd., Suite 950
Los Angeles, California 90048

United States District Court, Central District of California.

Affidavit of Alice Muller.

[Title Omitted in Printing]

Filed: Sept. 6, 1974.

State of California, County of Los Angeles—ss.

Alice Muller, being duly sworn, deposes and says:

I am the chief clerk of the power design and construction division of the Department of Water and Power.

Female members of the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Plan contribute 114.84% of their male counterparts' contributions. Contributions to the Plan are a condition of employment in the Department.

The Department employs approximately 12,000 persons, of whom approximately 1,900 are female. The vast majority of the female employees of the Department are working within the Central District of California.

There are approximately 400 women who are surviving spouses of Department employees who are presently receiving surviving spouse benefits, while there are approximately 3 men who are surviving spouses of Department employees who are receiving surviving spouses benefits.

I feel really disheartened that a great and usually forward-looking organization, as the Department of Water and Power surely is, does not give women equal employment opportunities with men. I feel that I have given every bit as much of myself, my mind, my heart, my energy, to the Department as a male em-

ployee. In return, I feel that the Department should want, as a useful management tool, to provide me with benefits equal to those provided male employees.

As late as the 1950's, Department women who were qualified by experience, education, seniority, and civil service test scores were often not given even the courtesy of a job interview because women were rarely considered for promotion. In those days, it would not have occurred to most of us women to file a grievance, if there had been such a process, even when the men who were appointed ahead of us were less qualified than we were, because double standards in business were accepted as the norm. Today that has improved, and women are generally given equal job opportunities and equal pay.

Unfortunately, the Department's retirement plan remains mid-Victorian. At the inception of the Plan in 1938, women were regarded as the weaker sex and benefited from "chivalrous" attitude of management. We were given the privilege of early retirement at age 55 (5 years earlier than men) and mandatory retirement at age 60 (5 years earlier than men). For those privileges, we women contributed our fair share, and as time went on, more than our fair share, to the Plan to compensate for our fewer working years and longer life expectancies.

In June, 1957, women received mixed blessings from the Plan. Our mandatory retirement age was increased to 62, ostensibly to coincide with the lowered retirement age for women with social security coverage (which we do not have). However, the Plan neglected to revise its retirement contribution schedule, and our monthly contributions continued to be deducted on

the basis of mandatory retirement at age 60. It was not until 1969, twelve years later, that the plan corrected our retirement contributions to reflect the change. To my knowledge, the twelve years of unfair and exorbitant contributions have never been adjusted.

In late 1972, sensing that changes in the Plan were imminent, a group of Department women banded together, very informally, as the Committee To Protect DWP Women's Retirement Benefits. We took the following action:

(1) On November 7, 1972, we addressed a letter to the administrator of the Plan, Allan F. Larson, setting forth our complaints. To date, we have not received an answer to this letter.

(2) A Department Management bulletin, dated November 22, 1972, invited employees to comment before the Board of Administration of the Plan on contemplated changes. Three members of the committee, Loma Bent, Mary Born, and I commented at the meeting of December 7, 1972. The Board, to date, has not acknowledged our presence at the meeting, nor answered any of our questions.

(3) At the request of the Department's General Manager, Robert V. Phillips, in February of 1973, four representatives of the committee (Loma Bent, Mary Born, Marie Manhart, and I) met with Mr. Phillips, Mr. Larson and the Department's attorney, Madeleine Flier. We committee women reiterated the information and questions contained in our original letter and our comments made before the Retirement Board. Mr. Phillips asked a number of pertinent questions, which led us to believe that he understood what we were asking for and that our requests were neither

outrageous nor stupid. Mr. Larson and Mrs. Flier remained uncommunicative during the entire meeting. None of the three attempted in any way to answer any of our questions during the discussion. To date, none of these persons has answered any of our questions.

(4) Water and Power Board Commissioner, John Luhring, who was also a member of the Board of Administration, contacted our committee and asked for a discussion with us. Loma Bent, Mary Born, Marie Manhart and I met with him in March of 1973. He asked many pertinent questions, and again, we felt that he understood our requests. On March 22, 1973, at a regular meeting of the Board of Administration, Mr. Luhring presented our comments and asked that they be transcribed and distributed to each board member for further study. He also requested that the plan actuary formulate a reply. To date, to my knowledge, there has been no further discussion to Mr. Luhring's request in any meeting of the Board of Administration, and the plan actuary has not presented information of any kind regarding retirement contributions of female employees.

I feel the committee has exhausted the traditional ways and means of communication through channels. All of our efforts have been to the unseeing, unhearing, unspeaking persons who take our contributions and refuse us information and consideration. I feel the Department is acting immorally and illegally.

/s/ Alice F. Muller
ALICE MULLER

Subscribed and sworn to before me this 5th day of September, 1974.

Signature: /s/ Michael Evan Gold
Notary Public in and for
said County and State

[Seal]

United States District Court, Central District of California.

Affidavit of Carolyn Mayshack.

[Title Omitted in Printing]

Filed: Sept. 6, 1974.

State of California, County of Los Angeles—ss.

Carolyn Mayshack, being duly sworn, deposes and says:

I am a black woman, and I provide the sole support for myself and my two children, aged 7 and 12. I am an employee of the Department of Water and Power.

My gross salary from the Department of Water and Power is $451.52 every two weeks. From this sum are deducted payments for Federal and State income tax, and $57.23 is deducted from every other check as my contribution to the retirement plan. Out of my monthly salary, there is available to me $615.00 per month for consumption.

The following are my fixed monthly expenses:

Rent	$185.00
Parking	6.00
Utilities	35.00
Food	175.00
Gas and Oil	25.00
Auto Insurance	20.00
Household Insurance	3.50
Dental Insurance	5.00
Medical Insurance	40.00
TOTAL	$494.50

The following are my flexible monthly expenses:

Credit Union Loan	68.00
Entertainment, Savings, Furniture and Appliances, Auto Repairs, Clothing	37.50

/s/ Carolyn E. Mayshack
CAROLYN MAYSHACK

Subscribed and sworn to before me this 5th day of September, 1974.

Signature: /s/ Michael Evan Gold
Notary Public in and for said County and State.

[Seal]

United States District Court, Central District of California.

Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction and Affidavits of Harry M. Church and Allan F. Larson in Support Thereof.

[Title Omitted in Printing]

Filed: Oct. 11, 1974.

I

THE DEPARTMENT OF WATER AND POWER'S RETIREMENT PLAN, WHICH USES SEPARATE MORTALITY TABLES FOR MEN AND WOMEN, COMPLIES WITH TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED IN 1972 (42 U.S.C. §2000e et seq.)

With respect to plaintiffs' cause of action founded upon Title VII of the Civil Rights Act of 1964, as amended in 1972 (42 U.S.C. §2000e et seq.), this is a case of first impression. None of the cases cited by plaintiffs in their Memorandum of Points and Authorities involves a fact pattern such as in this case.

Plaintiffs rely quite heavily upon a decision of the Equal Employment Opportunity Commission (hereinafter "EEOC") 74-118, issued April 26, 1974. As we shall set out in detail later, the EEOC's interpretation in that decision reflects a recent change of position.

Moreover, the United States Supreme Court's opinion in *Geduldig v. Aiello,* .... U.S. ...., 41 L. Ed.2d 256, 94 S. Ct. 2485 (June 1974), which was filed after the EEOC decision, casts serious doubts about the soundness of that decision.

By way of background, the Department's Retirement Plan (hereinafter "Plan") is a self-insured Plan that provides benefits for over 16,000 active and retired members. The Plan is designed to follow a single policy for men and women, i.e., women pay an equal proportion of the total cost of their benefits as men pay for theirs and the resulting monthly benefits for men and women are equal (Affidavit of Harry M. Church). In order to effectuate this single policy for men and women, the Department has recognized a fact which is established by reliable statistical data and of which this Court can take judicial notice—women have a longer life expectancy than men. (*Reed v. Reed,* 404 U.S. 71, 75, 30 L.Ed.2d 225, 92 S. Ct. 251 (1971)); *Gallentine v. Fiero,* 110 Cal. App. 345, 346, 294 P.59, 60, (1930). Since Department women live longer than Department men, the total payout to the woman is greater and since a single policy for both sexes must be maintained, it necessarily follows that the contribution rates of women must be higher than men (Affidavit of Harry M. Church).

Observed differences in mortality between men and women are not unique to the Department but are reflected in data for the general population as well as in data for the insured population.

The U.S. Census Bureau collects statistics for the entire population which show appreciably lower mortality rates for women than for men at all ages.[1] This phenomenon is not unique to the United States. The United Nations reports lower mortality rates for women

[1]"Life Tables," *Vital Statistics of the United States, 1970,* Vol. 2, Section 5, U.S. Department of Health, Education and Welfare, pp. 7-14.

than men throughout the world.[2] A notable exception is India, but even there the mortality rates for women above age 40 (once childbearing years are over) are appreciably lower than for men. The phenomenon is not recent. Sweden has maintained mortality statistics since 1780, and for the entire period, female mortality rates have been lower than male mortality rates.[3]

The Social Security Administration collects mortality data on workers, retired workers and other Social Security beneficiaries. These show higher differences in mortality between men and women than do the census statistics for the general population.[4]

Even though the observed differences in mortality have continued over the past 20 years—a period during which women's roles in the working force have drastically changed—it might be argued that these differences are explainable solely in terms of socio-economic differences. However, perinatal mortality rates (i.e., stillbirths occurring beyond the 20th week after conception and deaths in the first week of infancy) are over 20 percent higher for males than females.[5]

Evidence that the differences in mortality between the sexes are widening while the differences in their roles in society are narrowing comes from the *Metropolitan Life Statistical Bulletin,* December 1971. This

[2]*Demographic Yearbook 1970,* United Nations, 1971, Table 20, pp. 710-729.

[3]Keyfitz, N. and Flieger, W., *World Population:* An Analysis of Vital Data, Chicago: University of Chicago Press, 1968, pp. 604-637.

[4]Bayo, Francisco, "Mortality of the Aged," *Transactions, Society of Actuaries,* Vol. XXIV, Part 1, pp. 1-24.

[5]"Reduction in Perinatal Mortality," *Metropolitan Life Statistical Bulletin,* Vol. 43 (May 1962), pp. 6-8.

Bulletin shows that since 1920 the ratio of male to female mortality has increased by more than 60 percent.[6] Thus, it is indisputable that women live longer than men, and this difference in longevity is the basis for the Department's Retirement Plan which is actuarially designed to provide equal benefits for men and women.

While plaintiffs concede that women live longer than men and that the Department's Plan provides equal monthly benefits to both men and women, they mistakenly analogize this case to cases involving employment status, i.e. initial employment, promotional opportunities, retirement or termination. This mistake causes plaintiffs to fail to recognize the adverse impact on the compensation paid to Department men and women if contribution rates are equalized. Section 703(a) of Title VII (42 U.S.C. §2000e-2) provides, *inter alia*, that it shall be an unlawful business practice for an employer to discriminate against any individual with respect to his or her compensation.

There can be little dispute that pension provisions of a city charter are created, not as gratuities, but as an indispensable part of the contract of employment between the city and its employees, creating a right to pension benefits as an integral part of compensation. (*Abbott v. City of San Diego*, 165 Cal.App. 2d 511, 517, 332 P.2d 324, 328 (1958) Hearing denied (1959)). By rendering service for the period required, or by attaining a specified age, under the Plan, Department employees' rights to retirement benefits are earned and are in the nature of delayed compensation.

[6]Sex Differentials in Mortality Widening," *Metropolitan Life Statistical Bulletin*, Vol. 52 (December 1971), pp. 3-6.

(*Rochester Corporation v. Rochester*, 450 F.2d 118, 121 (4th Cir. 1971); *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247, 250-1 (7th Cir. 1948) cert. den. 336 U.S. 960). Since we are involved here with compensation, i.e. retirement contributions and benefits, the question that arises is whether the Department's Retirement Plan comes within the exception to Section 703(a), that part of Section 703 (h) was known as the Bennett Amendment (42 U.S.C. §2000e-2(h)). Defendants submit that it does.

The Bennett amendment provides:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))." [Subsection (d) was added by the Equal Pay Act of 1963, 77 Stat. 56.]

The intent of this amendment was to incorporate into Title VII the defenses that were permitted by the Equal Pay Act which was passed by the Congress and which had taken effect June 11, 1964. This intent is clearly disclosed by the colloquy in 110 Cong. Rec. 13647 (June 12, 1964):

> "MR. BENNETT. Mr. President, I yield myself 2 minutes. I call up my amendment No. 1051 and ask that it be read.
>
> THE PRESIDING OFFICER. The amendment will be stated. The legislative clerk read as follows:

On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

"MR. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

The PRESIDING OFFICER. (Mr. Ribicoff in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)

The amendment was agreed to."

Senator Bennett's remarks that sufficient attention had not been given to possible conflicts between the Civil Rights bill and the Equal Pay Act because of the wholesale insertion of the word "sex" in the bill was in apparent reference to the Smith amendment in the House Bill which added that term the day before the House sent its bill over to the Senate. Congressman Smith conceded he acted in haste in offering his amendment (which was agreed to by the House), and that he overlooked a number of areas where the term "sex" should have been added (110 Cong. Rec. 2718, 2720, Feb. 10, 1964). (See also Congresswoman Green's remarks (110 Cong. Rec.

2720, Feb. 10, 1964) pointing out that Congressman Smith's sex amendment was not given "full and careful consideration.") The Congressional debate of the Equal Pay Act did not suffer from this defect. The Bennett amendment makes it clear that the standards of the Equal Pay Act were to apply in the Civil Rights Act.

That the intent of the Bennett amendment was to preserve differences in pension and retirement benefits between men and women is clearly stated in the colloquy[7] between Senator Humphrey, the floor manager of the Civil Rights Bill in the Senate, and Senator Randolph as follows (110 Cong. Rec. 13663-64, June 12, 1964):

> "Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. HUMPHREY], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.
>
> I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.

[7]The Court in *Gruenwald v. Gardner*, 390 F.2d 591, 593 (2d Cir. 1968), Cert. Den. 393 U.S. 982 (1968), apparently had this legislative history in mind when it observed that variations in the amounts of retirement benefits based upon differences in the attributes of men and women do not violate the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.

> Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?
>
> Mr. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it.
>
> Mr. RANDOLPH. I am grateful for the reply."

Thus the legislative history of Section 703 of Title VII shows a clear Congressional intent to preserve the Equal Pay Act of 1963 (29 U.S.C. Section 206 (d)). In the leading Equal Pay Act case of *Schultz v. Wheaton Glass Co.*, 421 F. 2d 259 (3d Cir. 1970), Cert. Den. 398 U.S. 905 (1970), the Court held that the Civil Rights Act and the Equal Pay Act are in *pari materia*, and must be read together.

The Tenth Circuit also came to the same conclusion in *Ammons v. Zia Co.*, 448 F. 2d 117 (10th Cir. 1971) in considering a claim of sex discrimination in compensation brought under Title VII. The *Ammons* Court specifically held that Equal Pay Act standards must be used to determine whether a plaintiff has established a prima facie case.

The Wage-Hour Administrator, who is charged with the administration of the Equal Pay Act and whose opinions are entitled to "great deference", implicitly recognizes that actuarial treatment of men and women does not violate the Equal Pay Act (*Hodgson v. Jones*, 453 F.2d 515, 518 (8th Cir. 1971) rehearing den. (1972)). For instance, 29 CFR Section 800.116(d)

(30 F.R. 11504, Sept. 9, 1965, as amended at 31 F.R. 6770, May 6, 1966), provides as follows:

> "(d) *Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." [6(d) refers to the Equal Pay Act.]

This interpretation is also embodied in the Sex Discrimination Guidelines of the Office of Federal Contract Compliance (OFCC) to whom the Secretary of Labor has delegated the responsibility of implementing Executive Order 11246 (as amended, 3 CFR 169). In substance, that Order provides that all Government contracting agencies shall include specific terms in their contracts to provide for nondiscrimination in employment by Government contractors and their subcontractors. Section 60-20.3(c), 41 CFR (1970) states:

> "The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar 'fringe benefits' the employer will not be considered

> to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal."

The Wage-Hour Administrator has applied his interpretations consistently. For example, in his opinion letter of August 25, 1970 (CCH Labor Law Reports, ¶30,681), he held, inter alia, that pension contributions are wages within the meaning of the Equal Pay Act and that there is no violation of the Act if the resulting benefits are equal. That opinion reads as follows:

> "This is in further reference to your letter in which you inquired about the application of the equal pay provisions to the amounts an employer contributes toward a retirement or pension plan in behalf of his employees. In our response we said that this matter was under consideration and that we would advise you when a decision had been reached.
>
> After giving the question considerable study in light of the complex issues involved, we have now arrived at a determination that an employer's contributions to a plan providing retirement or pension benefits to his employees will be considered as 'wages' within the meaning of the Equal Pay Act.
>
> We are therefore, taking the position that where the employer's contributions to such a plan are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question may be greater for one sex than for the other. The fact that the employer may make unequal

contributions for employees of opposite sexes in such a situation will not, however, be considered a violation of the Equal Pay Act if the resulting benefits are equal for employees of both sexes where the equal pay standard otherwise applies." (Opinion Letter No. 1117 (WH-70). August 25, 1970).

And he reaffirmed that position in the following opinion of April 26, 1973:

"This is in further reference to your letter of December 13, 1972, concerning the application of the equal pay provisions of the Fair Labor Standards Act.

You state that some members of your association who are employees of nursing schools of universities or colleges are members of retirement plans [that use] different actuarial tables for men and women members. Women members having the same amount of accumulations to their individual accounts as male members of the plan, will upon retirement, get smaller monthly benefits than those received by male members.

Specifically you ask: 'If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits, is the employer in violation of the equal pay provisions?'

In response to your initial question, our opinion letter of August 25, 1970 [W & H Opinion Letter No. 1117], sets forth our current position under

the Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission (EEOC) on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future." (Opinion Letter No. 1276 (W-H 224), April 26, 1973: CCH Labor Law Reports, ¶ 30875).

The interpretations of the Wage-Hour Administrator and that of the Office of Federal Contract Compliance are in harmony with the Congressional intent in preserving the actuarial treatment of men and women. (See the Humphrey-Randolph colloquy, *supra,* 110 Cong. Rec. 13663-64, June 12, 1964). Moreover, such interpretations are consistent with the basic "equal pay" principle embodied in the legislation, the principle that overall compensation (both payments made directly to and on behalf of male and female employees) should be the same. This of course makes it appropriate to consider that demonstrated differences in pension costs for men and women constitute "a factor other than sex" which would justify differential treatment under the Equal Pay Act.

The Wage-Hour Administrator very early recognized the directive of Congress to consider such costs. The Administrator quoted from the Senate Report, and declared:

"It appeared to be the intent of Congress that the question of cost factors, as they relate to the application of the equal pay provisions of the Fair Labor Standards Act, should be taken into consideration when a determination is made

as to what constitutes a justifiable wage differential between employees of the opposite sex who are performing equal work within the meaning of the statute." (BNA Wage & Hour Man. 95: 607.)

The legislative history of Section 703(h) (42 U.S.C. 2000e-2(h)), clearly reveals the Congressional intent to require the Equal Opportunity Employment Commission to adopt the relevant opinions of the Wage and Hour Administrator in making interpretations under Title VII (See Wage-Hour opinion, WH-140, July 1, 1971, BNA Wage & Hour Man. 95:657).

Indeed, the EEOC has expressly honored this Congressional intent in its Guidelines (See 30 F.R. 14926, 14928, Dec. 2, 1965); Section 1604.7, provided in relevant part as follows:

"§ 1604.7 Relationship of Title VII to the Equal Pay Act.

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703 (h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.

. . . .

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. Relevant opinions of the Administrator interpreting 'the equal pay for equal work standard' will also be adopted by the Commission."

Moreover, EEOC decisions have applied the Equal Pay standards and have indicated that employers could rely on Wage and Hour interpretations on equal pay issues (Decision No. 71-1462, CCH, EEOC. Dec. ¶6219 n.1 (3-1-71)).

For nearly six and one half years, the EEOC followed the Wage-Hour Administrator's interpretations until April 1972, when it declared that it will no longer be bound by the Wage and Hour Administrator's interpretations. (29 CFR Section 1604.8 (1972)). It then revised its Guidelines to state that:

"It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex." (29 CFR Section 1604.9(f) (1972)).

Its interpretation (No. 74-118, upon which plaintiffs place heavy reliance) followed two years later (April 26, 1974) which stated that the use of mortality tables for men and women to determine retirement benefits were in violation of Title VII.

This change in position thus creates a current conflict between the EEOC on the one hand and the Wage-Hour Administrator and also the Office of Federal Contract Compliance on the other hand.

The EEOC's present Guidelines on pensions not only disregard the spirit and substance of the Equal Pay Act, but also confound notions of fairness and logic. As interpreted by the EEOC staff, its Guidelines require equal contributions as well as equal periodic pension payments for male and female employees of the same age and credits. Since women have a significantly longer life expectancy than men, this interpretation would force employers to contribute even more for their female employees than their male employees in order to provide the same contribution rates and the same monthly payments. Over the course of her remaining life, the average female annuitant would receive substantially more money than her male counterpart under such a requirement. The use of actuarial tables based on age and sex avoids such inequities between groups of annuitants.

Thus the recognition of female longevity as a factor affecting life expectancy in the establishment of contribution rates is an equitable practice, totally unlike the common group presumptions or sex-stereotypes which have been condemned as a basis for employment decisions. Women have often been disadvantaged by assumptions that certain characteristics are shared by all women. (See e.g., *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1972)).

For example, an employer may refuse to consider women for a position requiring the lifting of more than 30 pounds on the premise that women cannot lift such weight. Such a policy suffers from two logical defects: the premise itself, (1) may be based on misinformation or on notions of paternalism; and (2) is unnecessary, since the ability or trait can be individual-

ly ascertained by testing. By contrast, unquestionably reliable data establishes the fact of greater female life expectancy. Moreover, there is no alternative which would permit individual testing.

It is equally important to recognize that the alternative to grouping by sex suggested by the EEOC Guidelines is not individual testing. If the sex of annuitants must be ignored in determining benefit levels, insurers will be forced to make another assumption about a group of people, *i.e.*, men and women of the same age have equal life expectancies, which is demonstrably erroneous.

Although the use of sex-based actuarial tables has been recognized and approved by the courts, it has been suggested that pension plans should "average things out" by adopting a unisex table which ignores life expectancy differences based on sex. Ignoring the difference will not make it go away; male annuitants under such a plan would be required to subsidize the benefits of female annuitants.

II

EEOC'S INTERPRETATIONS ARE NOT BINDING, NOR ARE THEY ENTITLED TO DEFERENCE WHERE THEY ARE WRONG OR LACK CONSISTENCY

EEOC's recent change in position is not supported by legislative history—in fact it flies directly in the face of Congressional intent. Nor is it supported by judicial decisions. Its Guidelines on sex discrimination were implicitly rejected in *Geduldig v. Aiello*, ... U.S. ....., 41 L.Ed.2d 256, 94 S. Ct. 2485 (1974). The Supreme Court rendered its opinion after EEOC had announced its decision No. 74-118 (April 26,

1974). We shall address ourselves to *Geduldig v. Aiello* in further detail later on in this memorandum.

However, *Geduldig v. Aiello, supra,* was not the first instance where the Supreme Court has refused to defer the EEOC guidelines on sex discrimination. In fact, Justice Marshall, in his concurring opinion in *Phillips v. Martin Marietta,* 400 U.S. 542, 545, 27 L.Ed.2d 613, 616, 91 S Ct. 496 (1971) comments upon such refusal.

This Court is not bound by EEOC guidelines or its decisions. Title VII (42 U.S.C. 2000e *et seq.*) makes it quite clear that the EEOC does not have direct powers of enforcement. Congress withheld those powers in 1964 from the Commission and again in 1972 when it amended that Title. The Commission cannot adjudicate claims or impose administrative sanctions. The final responsibility for enforcement of Title VII is vested with federal courts *(Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 41, 39 L.Ed. 2d 147).

The Supreme Court in *Griggs v. Duke Power Co.,* 401 U.S. 424, 28 L.Ed. 2d 158, 91 S Ct. 849 (1971) has given deference to the EEOC's interpretation. But there the Court explicitly found that the interpretation was fully supported by legislative history.

On the other hand, in the recent case of *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 38 L.Ed. 2d 287, 94 S Ct. 334 (1973), the Supreme Court specifically stated that "Courts need not defer to an administrative construction of a statute where there are compelling indications that it is wrong." (*Espinoza, supra* at 94, 95). In that case, plaintiff, a resident alien, contended that the defendant employer violated Title VII by refusing to employ her because of her alien status. The Court said "The statute's legislative history, though

quite meager" fully supported the construction that Section 703 of Title VII was not intended to include defendant's employment practice of not hiring aliens. In rejecting the EEOC's guideline, the Court noted that the Commission itself once held a different view than that stated in its current guidelines. It said that deference should not be given to the Commission's changed interpretation where it would be inconsistent with an obvious Congressional intent.

As we have pointed out above, the legislative history of Title VII, with particular reference to Section 703, demonstrates a Congressional intent that insurance concepts of actuarial treatment continue on under Title VII (e.g., colloquy between Senators Humphrey and Randolph, *supra,* 110 Cong. Rec. 13663-64 and also the Bennett amendment colloquies, 110 Cong. Rec. 13647). In short, EEOC's new interpretation is inconsistent with an obvious Congressional intent. And it is also in conflict with the Wage-Hour Administrator who has consistently held that a system such as Defendant's is not in violation of the Equal Pay Act, an interpretation followed by the EEOC itself for nearly six and one-half years.

III

INDEPENDENT OF CONTRARY CONGRESSIONAL INTENT, THE SUPREME COURT'S RECENT DECISION IN *GEDULDIG v. AIELLO* CASTS SERIOUS DOUBTS ON THE VALIDITY OF EEOC'S GUIDELINES ON SEX DISCRIMINATION

Aside from Congressional intent to the contrary, EEOC's recent guideline change is suspect in light of the Supreme Court decision in *Geduldig v. Aiello,*

..... U.S. ....., 41 L.Ed. 2d 256, 94 S. Ct. 2485 (1974). In that case plaintiffs, who were women, contended that the exclusion of normal pregnancy from coverage of the California disability insurance system was an invidious discrimination based on sex and hence unconstitutional. A three-judge court (Northern District of California) agreed with that contention. The Supreme Court disagreed with the lower court and reversed.

The Court (at 41 L.Ed. 2d 262) noted that California's disability benefit system was established as an insurance program that was to function essentially in accordance with insurance concepts. It held (at 41 L.Ed. 2d 264) that the State of California had a legitimate interest in "maintaining the self-supporting nature of its insurance program" and that it also had a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees.

The Court went on to say (41 L.Ed. 2d at 264-65, n.20):

". . . .

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation

> such as this on any reasonable basis, just as with respect to any other physical condition.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."

The EEOC appeared as amicus curiae in the case and argued that pregnancy is a condition peculiar to women, and therefore California's exclusion of women from disability benefits for normal pregnancy is discrimination because of sex. Justice Brennan in his dissenting opinion noted that conclusion by the EEOC (41 L.Ed. 2d 267). He cited the Commission's Guidelines (41 L.Ed. 2d 267-68) which declared that practices such as California's were, in effect, unlawful sex discrimination. (29 CFR Section 1604.10(b) (1973)). He also cited another section of EEOC's Guidelines which the Supreme Court implicitly rejected. That section provides as follows (41 L.Ed. 2d at 269, n.9):

> "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 CFR § 1604.9(e).

The above quoted section was one of the bases for EEOC's decision No. 74-118. It will be recalled in that opinion, EEOC found the use of separate actuarial tables for men and women in pension systems violative of Title VII.

Thus the Supreme Court in *Geduldig, supra* effectively holds that actuarial considerations are permissible in designing an employee benefit system for men and women.

The standard for determining what is unlawful sex discrimination in *Geduldig,* although that case involved the Fourteenth Amendment, is applicable to Title VII cases. For example, the District Court, Southern District of New York, in *Communications Workers of America, et al. v. American Telephone and Telegraph Co., et al.,* 8 EPD, CCH Labor Law Reports, ¶ 9615 (August 2, 1974), applied the *Geduldig v. Aiello* standards to a Title VII case where the fact pattern was similar to that in *Geduldig*. The Court stated that:

> "The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination 'because of . . . sex.' 42 U.S.C. §2000e (2) (a)(1)."

The Court, *sua sponte,* dismissed plaintiffs' complaint and certified to the Court of Appeals pursuant to 28 U.S.C. § 1292 (b).

Furthermore, it is interesting to compare *Gruenwald v. Gardner,* 390 F.2d 591 (2d Cir. 1968), Cert. Den. 393 U.S. 982 (1968) in light of *Geduldig v. Aiello, supra,* and *Communications Workers of America, supra.*

In *Gruenwald,* the plaintiff, a man, was awarded Social Security Act benefits which were less than a woman would have received at the same age. He contended that there was an unequal treatment based solely on sex and that the special treatment for women was invidious discrimination. The Court disposed of that contention by saying (at 592-93):

> ". . . the trend of authority makes it clear that the variation in the amounts of retirement benefits based upon differences of men and women is constitutionally valid. The appellant does not press his argument that the section in question is violative of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1964), but we find that contention is also without merit."

IV
THE STATUS QUO SHOULD BE PRESERVED

A. DEFENDANTS AND PLAINTIFFS WILL SUFFER GREATER HARM IF THE PRELIMINARY INJUNCTION IS GRANTED

We need not elaborate on the obvious, but as the affidavits of both Harry M. Church and Allan F. Larson show, the actuarial soundness of the Department's Retirement Plan would be affected by the granting of the requested injunction. The Plan was carefully designed, and to simply reduce women's contributions without making other compensating changes would have an immediate adverse impact on the Department's Plan. Although the request for equalization appears simple in form, it overlooks the many complicated consequences that need to be fully considered.

Moreover, if the injunction requested by plaintiffs is granted, the Plan will not be properly funded, and defendants by maintaining the same would immediately be in violation of Los Angeles City Charter Section 220.1(1)(a). That Section mandates the Department to maintain the Plan in accordance with sound business practices and recognized actuarial methods.

What would be the effect of granting the preliminary injunction insofar as the class members themselves are concerned?

If the defendants were to prevail after protracted litigation, thousands of class members could be required to refund to the defendants sums which might amount to several hundred dollars apiece. The recovery thereof would create far greater hardships than preserving the status quo and could well lead to labor strife and irreparable damage to the excellent employee-employer relationship preserved at the Department of Water and Power to date.

The harm that defendants as well as individual members of the Plan will suffer if the injunction is granted is of no small consequence and even becomes more significant when compared with the alleged injuries suffered by plaintiffs Carolyn Mayshack and Alice F. Muller.

Plaintiffs rely upon the affidavits of Carolyn Mayshack and Alice F. Muller to show that they will suffer irreparable injury if a preliminary injunction is not granted. However, there is no showing that these two persons are typical of all other plaintiffs in the class or that other class members even concur in the sought-for preliminary injunction if there is a prospect that they will have to make up the difference in contributions, with interest, at a later date.

In Carolyn Mayshack's situation, the facts stated in plaintiffs' memorandum erroneously state (page 42) that her counterpart pays $9.50 a month less than she pays. However, of the $57.23 a month that Ms. Mayshack pays to the Plan, $47.58 is contributed to the Retirement fund. The balance is paid to the Death and Disability funds. Her male counterpart pays $41.44 a month to the Retirement fund or $6.14 a month less. The male counterpart's contribution to the Death and Disability funds are exactly the same as Ms. Mayshack's. (Affidavit of Allan F. Larson). In addition, her affidavit understates her monthly take-home pay. (See affidavit of Allan F. Larson).

Alice F. Muller's emotional reaction to the Plan's design appears to be one that is strictly personal and cannot be said to be typical of all others. She has neglected to mention that she has been a member of defendant Board of Administration. During her period of service on that Board she knew or she should have known of the actuarial bases for the Plan and of the fact—which plaintiffs concede—that women live longer than men. Her letter of resignation from that Board (See affidavit of Allan F. Larson) certainly gave no hint of any disagreement in the actuarial treatment of men and women. Further, it appears that she was complimentary in that she refers to the Plan as "well-administered", and the Board as "earnest, knowledgeable and progressive."

Ms. Muller's attempt to render an actuarially equal plan to an actuarially unequal plan would discriminate against male employees. In connection with this prospect, we invite the Court's attention to the fact that the ENGINEERS AND ARCHITECTS ASSOCIATION has filed a charge with EEOC on behalf of

men charging that women are presently getting greater benefits than men. (Exhibit A)

B. THE PUBLIC INTEREST WILL NOT BE SERVED BY THE GRANTING OF A PRELIMINARY INJUNCTION

The public interest will not be served by the Court's granting a preliminary injunction which would have the effect of making the Department's Plan unsound, since the importance of an employer's maintaining a sound pension system is indisputable.

Moreover, the granting of an injunction would have an impact on other public retirement systems—a factor that should not pass unnoticed by this Court. Every other public retirement system of which we are aware utilizes separate mortality tables in operating their systems (affidavit of Harry M. Church.)

Undoubtedly, there are many private pension plans that are similarly designed. A preliminary order to stop withholding contributions in varying amounts would provide a precedent for further similar orders and a final judgment to the contrary could lead to a multiplicity of lawsuits for back contributions. The injunction would spill beyond the boundaries of this case and send giant ripples throughout the country.

Nor does the public interest require, as plaintiffs suggest, that defendants refine their mortality tables by further subdivision of classes, i.e., smokers and non-smokers. As Justice Douglas pointed out in his opinion for the Supreme Court in *Kahn v. Shevin*, ... U.S. ....., 40 L.Ed. 2d 189, 94 S Ct. 534 (1974), the controlling test is whether the classification is legally permissible and not whether it is perfect. As we have

shown above, the Congressional intent is to permit the continuation of the use of actuarial tables based on objective factors.

CONCLUSION

For the foregoing reasons, defendants urge the Court to deny plaintiffs' motion for a preliminary injunction.

DATED: October 11, 1974.

Respectfully submitted,

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power
MADELEINE I. FLIER, Deputy City Attorney
GILBERT W. LEE, Deputy City Attorney

By /s/ Madeleine I. Flier
MADELEINE I. FLIER
Deputy City Attorney

111 No. Hope Street
P.O. Box 111
Los Angeles, California 90051

Attorneys for Defendants

EXHIBIT A.

Return Address: Equal Employment Opportunity Commission, 1543 W. Olympic Blvd., Suite 340, Los Angeles, California 90015.

Important: See Notice of Non-Retaliation on Reverse.

Mailing Address: Chief Executive Officer, Department of Water & Power, 111 N. Hope Street, Los Angeles, California 90012.

Future Correspondence Will Refer to Charge No.: TLA3 0184.

Date of Violation: 07/72.

Place of Violation: Same as Addressee.

NOTICE OF CHARGE OF
EMPLOYMENT DISCRIMINATION

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-5, as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you until the charge is served.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.

We will investigate this charge as soon as possible. However, our heavy backlog of pending work makes it impossible to predict when we will contact you again. We hope that you will hold any questions about this specific complaint in abeyance until we are able to begin the investigation.

Basis of Discrimination: Race or Color, No; Sex, Yes; Religion, No.; National Origin, No.

Nature of Charge: Benefits. [Other items not checked omitted in printing.]

Date: Nov. 15, 1972.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
1543 West Olympic Boulevard, Suite 340
LOS ANGELES, CALIFORNIA 90015

IN REPLY REFER TO:
RECEIPT FOR SERVICE OF CHARGE
CASE NUMBER: TLA3 0184

Engineers & Architects vs. L. A. Dept. of Water & Power Association

This document certifies service of a copy of the one attached charge alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

Served by Wendell Wilson, Equal Opportunity Specialist of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, to

Mr. Irvin E. Remy
Industrial Relations Administrator
Department of Water & Power
111 N. Hope Street
Room 555
Los Angeles, California

RECEIPT ACKNOWLEDGED BY:

/s/ Irvin E. Remy
Signature
/s/ Industrial Relations Administrator
Title
December 8, 1972
Date

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Reginal Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE).

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

1. Your Name: Engineers and Architects Association, Civic Center Chapter; Phone Number 624-9317; Street Address: 417 South Hill Street, Room 756; City: Los Angeles; State: California; Zip Code: 90013.

2. Was the Discrimination Because of: (Please Check one) Race or Color, No; Religious Creed, No; National Origin, No; Sex, Yes.

3. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all. Name: Department of Water and Power of the City of Los Angeles; Street address: 111 North Hope Street; City: Los Angeles; State: California; Zip Code: 90012. AND (other parties if any) Board of Water and Power Commissioners, Board of Administration and the Administrator-Secretary of the Department of Water and Power Retirement, Disability and Death Benefit Plan.

4. Have you filed this charge with a state or local government agency? Yes.

5. If your charge is against a company or a union, how many employees or members?

6. The most recent date on which this discrimination took place: Month: July; Day: .....; Year: 1972.

7. Explain what unfair thing was done to you. How were other persons treated differently? Please see attached statement.

8. I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date: July 31, 1972.

Subscribed and sworn to before me this 31st day of July, 1972.

/s/ Sandra E. Abrahamian

No. 7

The charged parties have the responsibility, in various measure, for administration of the Retirement, Disability and Death Benefit Plan of the Department. The Plan as structured and administered, discriminates against male employees in that it requires unequal contribution rates during the term of active employment and because, notwithstanding the fact that it has collected greater contributions from male employees during the term of active employment, it pays greater pension benefits to female employees of like standing.

United States District Court, Central District of California.

Affidavit of Harry M. Church.

[Title Omitted in Printing]

State of California, County of Los Angeles—ss:

HARRY M. CHURCH, being duly sworn, deposes and says:

I am a partner in the firm of Coates and Crawford, Consulting Actuaries; I have continuously engaged in the actuarial consulting practice since 1952; I am an Associate of the Casualty Actuarial Society; Associate of the Society of Actuaries; Member of the American Academy of Actuaries; and Member of the Western Pension Conference; I am the consulting actuary for the Department of Water and Power Retirement Plan and have been since February 1, 1957; I also serve as consulting actuary to numerous other public retirement systems.

In my professional opinion, women live longer and have a greater life expectancy than men. The bases for my opinion are the following:

(1) I have personally conducted numerous statistical studies of male and female mortality including a number of studies conducted on Department of Water and Power employees—most recent of which was as of June 30, 1972. Each study involves a scientific determination of the probability of mortality of a determined group of individuals.

(2) Our firm has conducted numerous other mortality studies over a period of many years and I am cognizant of mortality studies conducted by others throughout the nation. Mortality tables for annuity

and pension purposes are established from and in accordance with such professionally conducted studies of mortality. All studies and mortality tables of which I am aware reflect the fact that women live longer than men.

(3) Every public retirement system in the State of California of which I am aware reflects the difference in mortality between men and women.

Sound actuarial practice requires that annuity or pension plans be based on averaging of life expectancies of persons in ascertained classes (usually age and sex) since the life expectancy of a specific person cannot be predetermined.

The Department of Water and Power Retirement Plan is designed to provide that female employees pay an equal proportion of the total cost of their benefits as male employees pay for theirs. The Plan is also designed to pay the same benefits per month to men and women; but because the life expectancy of women is longer, the total payout to women is greater. Because female employees of the Department live longer than male employees and the total payout to females is greater, it necessarily follows that female contribution rates must be higher than male contribution rates. However, if a man and woman each make equal monthly contributions during their working lives, then the return to each during their retired lives (i.e., the total of their respective pension allowances) will be substantially equal, with women receiving somewhat greater benefits.

In addition, the Plan provides four optional benefit programs which the employee may elect upon retirement. All four of these options provide both a greater

monthly as well as total benefit to women than they provide to men.

With respect to surviving eligible spouse benefits that are available to both male and female employees, Department employees do not contribute for such benefits.

As a result of my most recent (1972) mortality study, the Board of Administration of the Retirement Plan adopted the 1951 Group Annuity Mortality Table. This table is published in the Transactions of the Society of Actuaries and is used extensively by both public and private retirement systems to reflect the mortality of retired lives. Consistent with other pension and annuity tables, this table provides separate tables for men and women.

Contribution rates of Department women are 14.84% higher than the contribution rates of men under the Retirement Plan. This factor was calculated by us and reflects the relationship between the life annuity values at age 65 for men and women based upon the 1951 group annuity mortality table.

If the female contribution rates to the Retirement Plan are reduced to the male contribution rate level and no additional changes are made, then the retirement plan will not be properly funded, i.e., assets on hand plus future contributions made to the Fund will not be adequate to provide the benefits that have been promised. In other words, the total actuarial liabilities of the Plan will exceed the total actuarial assets.

/s/ Harry M. Church
HARRY M. CHURCH

Subscribed and sworn to before me this 1st day of October, 1974.

/s/ Inez P. Egan
Notary Public in and for the County of
Los Angeles, State of California

[Seal]

United States District Court, Central District of California.

Affidavit of Allan F. Larson.

[Title Omitted in Printing]

State of California, County of Los Angeles—ss:

ALLAN F. LARSON, being duly sworn, deposes and says:

I am the Administrator-Secretary for the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan; I am the custodian of all the records of the Plan; I have served as the Administrator-Secretary since June 1970, and for the five preceding years I served as the Assistant Administrator-Secretary; I have been an employee of the Department of Water and Power for more than 38 years.

A woman employee pays into the Retirement Fund approximately 14.84% more than a man entering the Retirement Plan at the same age. In addition to other Department payments to the Retirement Fund, the Department pays each month at the rate of 110% of the employee payments. For example, if a man contributes $1.00, the Department contributes $1.10 for his account. A woman who entered the Retirement Plan at the same age as the man would contribute $1.15 and the Department would contribute $1.26 for her account.

The preceding contribution ratios are necessary to satisfy the following basic design concepts of the Plan:

1. Women's monthly retirement allowances should equal those provided men with the same age at employment and retirement and with the same Department service and salary history.

2. Women should contribute to the Retirement Fund the same proportion of the total moneys as contributed by men, required to pay their respective retirement allowances for their respective expected lives at retirement. As women live longer, they should contribute on a higher basis.

Periodic actuarial studies of the deaths of former employees receiving monthly service retirement pensions consistently disclose that Department women outlive Department men, and that this difference in average life expectancy is widening.

Based upon the general actuarial survey and evaluation of the Retirement Plan most recently completed on June 30, 1972, the Board of Administration adopted the "1951 Group Annuity Table" published in the transactions of the Society of Actuaries. This table has been adopted for Plan use in determining the total moneys which must be set aside for lifetime retirement allowances of employees upon their retirement. The table was adopted because it, better than other mortality tables, would have predicted the deaths of persons receiving service retirement pensions from the Plan.

To require that women contribute at the same rates as men and still provide that women receive the same monthly retirement allowance as men with no other changes to the Retirement Plan will result in improper funding of the Retirement Plan; that is, assets on hand plus future contributions made to the fund will not be adequate to provide the benefits that have been promised.

If the Department's monthly contributions to the Retirement Fund were increased by an amount equal to the difference between male and female present contribution rates, the Department's expected total retirement compensation for women retiring at age 65 (under formula retirement pensions) would be at least 17.5% greater than for men retiring at age 65. This difference is exclusive of cost of living adjustments which currently provide additional compensation to retirees. Since Department women live longer than Department men, they receive cost of living adjustments over a longer period than men. If 3% cost of living adjustments are granted each year, the Department's expected total contributions would be 30% greater for women than for men.

Alice F. Muller was appointed to the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan and attended her first meeting on January 25, 1968. She was then elected to serve a three-year term starting October 13, 1968. Ms. Muller filed a letter of resignation with the Board on December 19, 1968 (a copy of that letter is attached hereto).

Carolyn Mayshack's annual salary, based on 2088 hours a year, is $11,784. On an hourly basis, this is equivalent to $5.644 per hour. Her monthly salary, based on 174 hours, is $982. Ms. Mayshack is paid every two weeks or for an 80-hour work period. For a four-week period, or 160 hours, she would gross $903.04.

Federal and state income taxes are withheld from Ms. Mayshack on the basis of her being married and claiming one exemption (herself). The federal income

tax withheld for each two-week pay period is $67.13; the state income tax withheld is $7.49. If Ms. Mayshack were to claim an exemption for herself and two dependents, the amount of income taxes withheld would be $55.20 and $4.80 for federal and state respectively.

Contributions to the Retirement, Death and Disability Funds are deducted from twelve of the twenty-six biweekly pay period checks per year. For Ms. Mayshack, a total of $57.23 a month is deducted. Of this amount $6.14 is contributed to the Disability Fund; $3.51 is contributed to the Death Benefit Fund, and $47.58 is contributed to the Retirement Fund. Her male counterpart would pay $41.44, or $6.14 less than Ms. Mayshack, to the Retirement Fund, and he would pay identical amounts as Ms. Mayshack to the other two funds.

Ms. Mayshack's "take-home pay" after withholding for federal and state income taxes and contributions to the three funds averages $704.39 for a four-week period (160 hours) and is $762.41 for a monthly period (174 hours). If Ms. Mayshack were to claim two additional exemptions for her dependents, her take-home pay would be $733.63 for a four-week period and $794.27 for a monthly period.

/s/ Allan F. Larson
ALLAN F. LARSON

Subscribed and sworn to before me this 11th day of October 1974.

/s/ Sylvia F. Hoffman
Notary Public in and for the County
of Los Angeles, State of California

[Seal]

December 17, 1968

The Board of Administration
Water and Power Employees
Retirement Plan
Building

Gentlemen:

With regret I tender my resignation as a member of the Board of Administration of the Retirement Plan, effective immediately. I have been appointed to a new position in the Power System, and will be unable to continue as a Board member.

Though I have long dreamed of working on a power construction project, my appointment to such a job seemed outside the realm of possibility, even as recently as the Retirement Board election. I apologize for the break in continuity my resignation is causing, but I feel that I must give all my energy and attention to my new job—and it is only fair that the employees in the Joint Group be represented by one of their own.

It has been a pleasure and a valuable experience to serve on the Board, and I shall miss it, and each of you, more than you can imagine. I leave you, knowing that our Retirement Plan is well-administered, and that by bright and not-too-distant future as a retired employee is in the hands of a Board that is earnest, knowledgeable, and progressive.

Sadly,
/s/ Alice Muller

Mr. Benson moved that Miss Muller's resignation be accepted with regret. Mr. Nystrom seconded the motion.

Ayes: Members: Benson, Luhring, Nystrom, Kanouse, Sachau, Mullin

Noes: None

-Letter attachment
LARSON Affidavit-

[Affidavit of Service Omitted in Printing]

United States District Court, Central District of California.

Memorandum and Order Granting Plaintiffs' Motion for Preliminary Injunction.

Marie Manhart, et al., Plaintiffs, v. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil No. 73-2272-HP.

Filed: Jan. 15, 1975.

Printed as Appendix B to the Petition for Writ of Certiorari.

United States District Court, Central District of California.

Preliminary Injunction.

Marie Manhart, et al., Plaintiffs, v. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil No. 73-2272-HP.

Filed: Jan. 15, 1975.

This matter having come on for hearing on plaintiffs' motion, made pursuant to Rule 65, F.R.Civ.P., for a preliminary injunction, and the court having this day filed its Memorandum and Order (which constitute the court's findings of fact and conclusions of law, as authorized by Rule 52, F.R.Civ.P.) which grants plaintiffs' motion;

IT IS ORDERED that:

1. Defendants are enjoined from requiring individual female employees to make larger contributions than individual male employees to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan.

2. This Preliminary Injunction shall remain in effect until further order of this court.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Preliminary Injunction, by United States mail, upon the attorneys of record for the parties herein.

Dated: January 15, 1975.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

United States District Court, Central District of California.

Motion for Summary Judgment.

[Title Omitted in Printing]

Filed: Apr. 10, 1975.

The plaintiffs move the Court as follows:

1. That it enter, upon the grounds that there is no genuine issue as to any material fact and the plaintiffs are entitled to a judgment as a matter of law, and pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the following summary judgment in the plaintiffs' favor:

That the practice of the Department of Water and Power of the City of Los Angeles of requiring females to make larger monthly contributions to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan than their counterpart males was an unlawful employment practice within the meaning of Section 701(a)(1) of the Equal Employment Opportunity Act of 1972;

That the defendants are permanently enjoined from requiring individual female employees to make larger contributions than individual male employees to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan;

That (a) all female employees presently working for the Department of Water and Power who are members of the Retirement Plan, (b) all female members of the Plan who retired from the active service of the Department of Water and Power on or after March 24, 1972, and (c) all females who resigned from the active service of the Department of Water

and Power on or after March 24, 1972, who left contributions to the Water and Power Retirement Fund on deposit, shall be refunded all of their contributions made on and after March 24, 1972 which exceed the contributions their male counterparts would have made on and after March 24, 1972, plus interest at seven percent (7%) running from the date of contribution;

That the defendants pay counsel for the plaintiffs reasonable attorneys' fees; and

That the defendants reimburse the plaintiffs for the costs of this action; or, in the alternative,

2. That the Court enter, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, a summary judgment in the plaintiffs' favor on the issue of liability alone, the issue of relief to be decided by the Court after an appropriate hearing thereon, upon the grounds that there is no genuine issue as to any material fact with respect to the issue of liability and that the plaintiffs are entitled to summary judgment on the issue of liability.

This motion is based upon the Statement of Reasons and Memorandum of Points and Authorities filed by the plaintiffs in Support of their Motion for Preliminary Injunction, the Affidavits which accompanied the Statement of Reasons, the plaintiffs' Reply Memorandum in Support of their Motion for Preliminary Injunction, the plaintiffs' Additional Points and Authorities in Support of their Motion for Preliminary Injunction, and the Statement of Reasons and Memorandum of Points and Authorities in Support of Summary Judgment which accompany this Motion.

DATED: April 8, 1975.

KATHERINE STOLL BURNS
ROBERT M. DOHRMANN
MICHAEL EVAN GOLD
Schwartz, Steinsapir & Dohrmann

/s/ By M. Gold
MICHAEL EVAN GOLD
Attorneys for Plaintiffs

United States District Court, Central District of California.

Objections to Proposed Findings of Fact and Conclusions of Law; Additional Proposed Findings.

Marie Manhart, et al., Plaintiffs, vs. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil Action No. 73-2272-HP.

In the event the Court grants plaintiffs' Motion for Summary Judgment defendants have the following objections to the proposed findings of fact and conclusions of law.

Proposed Objections to Findings of Fact

First Finding of Fact:

Defendants object to this finding on the grounds that:

1. There is no evidence that any of the plaintiffs or the Committee to Protect Women's Retirement Benefits have standing to represent the class of employees who have resigned and left contributions on deposit with the Plan.

2. There is no evidence that the Committee to Protect Women's Retirement Benefits has any separate standing to represent employees since the membership of such ad hoc organization has not been established yet.

Third Finding of Fact:

Defendants object to this finding on the grounds that it is incomplete. Defendants propose the second sentence be amended to read:

> "The Plan is funded by compulsory employee contributions matched 110% by compulsory employer contributions, and earnings thereon."

[Affidavit of Allan F. Larson, Exhibit A, p. 33 to Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction.]

Fourth Finding of Fact:

Defendants object to this finding on the grounds that it misstates the facts. Where females as a class outlived their male counterparts, the Plan paid substantially more benefits to them. Defendants submit the Finding should read:

> "Between March 24, 1972 and December 31, 1974, the Plan paid the same monthly benefits to male and female retirants of the same age and length of service. However, slightly higher contributions were required of female employees than males because they live longer and would collect monthly payments for a longer period of time."

[Supplemental affidavit of Allan F. Larson to Statement of Genuine Issues and Points and Authorities in Opposition to Motion for Summary Judgment.]

Fifth Finding of Fact:

We request that the Fifth Finding of Fact be supplemented by adding:

> "The union, IBEW Local 18, did not exhaust state remedies by filing any claim of discrimination with the State Fair Employment Practices Commission or any other state agency. The State would not take deferral of the action from the EEOC on the grounds that it had no jurisdiction in the matter. [Affidavit of Barbara Miller to Memorandum of Points and Authorities in Opposition to Motion to Dismiss.] None of the other named

> plaintiffs, apart from IBEW Local 18, filed charges with any public agency, federal or state."

We request the following additional Findings of Fact:

Seventh Finding of Fact:

> "Women as a class outlive men; and Department of Water and Power female employees and retired employees outlive their male counterparts."

[Affidavit of Allan F. Larson and Harry M. Church in Support of Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction.]

Eighth Finding of Fact:

> "There was no Congressional intent in adopting the Civil Rights Act of 1964, and more specifically, Title VII thereof, to allow the continuance of the practice of computing benefits in public retirement plans based on separate male and female mortality and life expectancy tables."

Proposed Objections to Conclusions of Law

Conclusion No. 2:

Defendants submit that this Conclusion should reflect the fact that there was no deferral to the state agency as required by the regulations relative to Title VII [Title 29 C.F.R. §1601.12], whether because the state agency refused to take deferral or plaintiffs failed to apply to that agency for relief on their own.

Conclusion No. 6:

Defendants object to this Conclusion on the grounds that defendants' Plan is that of a public agency and defendant Department of Water and Power is a public employer. We submit that an award of money damages

and interest thereon, against an agency of the state is in violation of the Eleventh Amendment to the United States Constitution. [*Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974); *Fitzpatrick v. Bitzer,* 8 EPD, par. 9685, p. 5878 (1974).]

It is significant that none of the cases cited by plaintiffs for the authority to receive monetary awards of back pay, or back pay and interest, involve a public agency.

Even though plaintiffs characterize this requested award as restitution, if the money is withdrawn from the Retirement Fund in which it was deposited, it will be necessary to replace it to maintain a financially sound retirement system. That replacement will have to be at the expense of the contributors or the Department of Water and Power, which means ultimately the general public.

Dated: May 15, 1975.

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant
City Attorney for Water and Power

/s/ By David J. Oliphant
DAVID J. OLIPHANT
Deputy City Attorney

[Proof of Service Omitted in Printing]

United States District Court, Central District of California.

Statement of Genuine Issues and Points and Authorities in Opposition to Motion for Summary Judgment.

Affidavits of Harry M. Church and Allan F. Larson; and Their Supplemental Affidavits.

Marie Manhart, et al., Plaintiffs, vs. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil Action No. 73-2272-HP.

Filed: May 15, 1975.

Introductory Statement

Having obtained a preliminary injunction herein, plaintiffs now seek summary judgment on the grounds that no genuine issues of fact remain to be tried. Such is not the case, and defendants must oppose the granting of summary judgment or lose the opportunity to make a full and fair record of their case.

Plaintiffs seek back pay from March 24, 1972. It is their position that since the injunction has been granted, liability is determined and all that remains is the appointment of a Master to figure out what the Department must pay plaintiffs. However, defendants take the position that none of the women covered by this action have in fact lost anything as a result of paying a higher contribution rate. We believe that the requirement of higher contributions was perfectly in keeping with Title VII of the Civil Rights Act, and to return moneys to plaintiffs would give them a windfall of funds to which they are not entitled since they paid contributions measured by the value of their benefits, as did their male counterparts.

In order to fully protect defendants' rights in this lawsuit, it is absolutely necessary that they be permitted to put in evidence the complete proof of the actuarial bases for their retirement plan (hereinafter "Plan").

When the Court granted the Motion for Preliminary Injunction, the Plan had already equalized contribution rates, making the issuance of the injunction moot (see Motion to Dissolve Preliminary Injunction) but the basis for awarding back pay and, indeed, the entire retirement plan is still in issue. It is not enough to say that women paid more to get more. The concept of separate mortality tables forms the whole base for the Plan and there is a genuine factual issue as to the soundness of that concept.

In addition, there are some other issues still to be resolved by the lawsuit.

Attached hereto, as Exhibits "A" and "B", and incorporated herein by reference are copies of the Affidavits of Harry M. Church and Allan F. Larson previously filed with the Court, as part of and attached to defendants' Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction.

I
STATEMENT OF GENUINE ISSUES

Conceding that from March 24, 1972 through December 31, 1974, the "Plan" provided for higher contribution rates for females, defendants submit that there still exists the following genuine issues:

1. Did the "Plan" actually discriminate against the female employees so as to entitle them to recover back contributions?

2. Is there a valid economic purpose for requiring higher contribution rates for females under the "Plan"?

3. What are the actuarial differences in life expectancy between male and female employees of the Department?

4. Are the actuarial findings and statistics upon which contribution rates are established reasonably accurate and valid?

5. What is the effect of equalizing contribution rates and monthly benefits upon "Plan" beneficiaries? Does it, in fact, comply with Title VII?

6. How much has each class covered by this action been damaged?

7. Is each of the classes represented entitled to any refund hereunder?

II
SUMMARY JUDGMENT IS NOT PROPER IF GENUINE ISSUES OF FACT REMAIN TO BE RESOLVED BY THE COURT

A trial is absolutely necessary where there is a genuine issue as to any material fact [6 Moore, Federal Practice Para. 5.15(1) at 2281 (1974)].

"[T]he court, on a motion for summary judgment, cannot *try* issues of fact but can only determine whether there *are* issues of fact to be tried; and, once having determined this affirmatively must lease those for determination at a trial."

> *Empire Electronics Co. v. United States,* 311 F.2d 175, 179, 6 F.R. Serv. 2d 56c.41 Case 11 (2d Cir. 1962)

"Summary judgment of course is proper only where there is no genuine issue as to any material fact. Rule 56(c) F.R. Civ. P. The *movant* has the burden of clearly demonstrating the absence of any genuine

issues as to all the material facts applicable under his theory of the law, and a party opposing summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the evidence. The court may not weigh or resolve issues." (Emphasis added.)

G.S. Leonard et al. v. BHJK Corporation, 469 F.2d 108, 110 (D.C. Cir. 1972)

III

IF THE MOTION IS GRANTED, DEFENDANTS WILL BE DENIED THE OPPORTUNITY TO MAKE A COMPLETE RECORD OF THE BASES FOR DIFFERENT CONTRIBUTION RATES AS A PART OF THE TOTAL RETIREMENT PLAN

The importance of affording defendants a full opportunity to make their record in this lawsuit cannot be over-emphasized. *Geduldig v. Aiello,* 415 U.S. 973, 8 FEP 97, 7 EPD Para. 9432 (1974) was the case involving the California disability insurance program, in which the Supreme Court upheld the refusal to grant certain pregnancy benefits against a challenge that such violated the Equal Protection Clause of the Fourteenth Amendment. In that case, the presentation of all the facts involving the disability program, together with its costs and the costs of providing pregnancy benefits, led to the ruling in favor of the program. As stated by the court in *Communication Workers of America et al. v. American Telephone and Telegraph Company,* .... F.2d .... 9 CCH, EPD ¶ 10,035, p. 7279; (2d Civ. 1975) (a Title VII case involving pregnancy benefits, which the court refused to dismiss on the rationale of the *Aiello* case) at p. 7283:

> "Finally, it should be noted that in the case at bar, in contrast to *Aiello,* only the bare allegations of the complaint couched in general language, largely taken from the statute and the guidelines, were before the district court. *Aiello* was decided on a full record in which the nature, details, operations and effect of the state insurance plan under attack and the reasons for its enactment were fully explored. The ultimate merits of the case at bar are not ripe for determination on such a record or at this stage of the proceedings."

Defendants believe that given a complete picture of the nature, details, operations and effect of each of the provisions of the defendants' Plan and the actuarial bases therefor, the Court will be in a far better position to determine wheher in fact such plan did operate in violation of Title VII.

The plaintiffs cite *Chastang v. Flynn & Emerick Co.,* 365 F. Supp. 957, 6 F.E.P. Cases 357 (D.Md. 1973) as authority for giving immediate judgment and referring the question of damages to a master. However, in that case, trial of the liability portion of the case had been litigated to completion (supra p. 959). Such is not the case here. We have only tried the advisability of issuing a preliminary injunction. Furthermore, we submit even that issue was moot at the time of the granting of the injunction. (See Motion to Dissolve Preliminary Injunction filed heretofore by defendants.)

In a similar vein was *Phillips v. Martin Marietta Corp.,* 400 U.S. 542, 91 S. Ct. 496, 3 FEP 40 (1971) wherein the Supreme Court remanded a Title VII case dealing with refusal to hire women with pre-school age children, for evidence to be presented on the ques-

tion of whether such restriction was a bona fide occupational qualification. Although the court overruled the employer's motion for summary judgment, it expressly recognized that "[t]he existence of such conflicting family obligations [i.e. need to care for pre-school children] if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under §703(e) of the Act." (*supra* p. 544). If the Supreme Court felt that it was necessary to allow the employer to show the validity of such employment condition, then surely defendants herein should be permitted the same opportunity, where even plaintiffs concede the validity of the basic premise that women live longer than men (Statement of Reasons and Memorandum of Points and Authorities in Support of Preliminary Injunction, pages 16 and 17).

IV

ANY AWARD OF BACK PAY IS INEXTRICABLY INTERWOVEN WITH PROOF OF THE IMPROPRIETY OF DEFENDANTS' PLAN PROVISIONS AND REQUIRES A FULL TRIAL ON THAT ISSUE ALONE

Damages under Title VII are discretionary with the Court. Section 706 (g) thereof [42 U.S.C. §2000e-5(g)] provides, in part:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees

> with or without back pay . . . or any other equitable relief as the court deems appropriate."

Plaintiffs cite *Johnson v. Georgia Highway Express, Inc.*, 417 F. 2d 1122, 2 FEP Cases 231 (5th Cir. 1969) as authority for awarding them back pay to reimburse them for their "losses". That case notes at page 1125 that awards of back pay are discretionary. It is to this discretion that defendants would respectfully address themselves in conducting their defense.

First, it is the position of defendant that plaintiffs in fact lost nothing by paying a higher contribution rate (See Affidavit of Harry M. Church, page 3, Affidavit of Allan F. Larson, pages 2 and 3, and Supplemental Affidavit of Allan F. Larson, page 1). In order to prove this to the Court is will be necessary to explain how the retirement plan works and the actuarial basis for each provision thereof. It will also be necessary to show both the general difference in longevity between men and women and the Department's experience and treatment of longevity. We submit that the greater the difference in life expectancy and percentages of Department employees and retirees which meet that expectancy, the greater the validity of defendants' Plan. In the alternative, the establishment of a *valid* single unisex mortality table is also a genuine issue in the light of the whole Plan.

Second, defendants' conduct was approved by two competing agencies of the federal government, which to our knowledge have still not changed their standards, i.e. the Office of Federal Contract Compliance and the Wage and Hour Administrator of the Department of Labor. (We respectfully refer the Court to our

Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, pages 9-14). As stated in the 1974 Sex Discrimination Guidelines of the Office of Federal Contract Compliance (41 CFR Section 60-20.1(c) p. 287):

> "[T]he employer will not be considered to have violated these guidelines if his contributions are the same for men and women *or* if the resulting benefits are equal." (Our emphasis.)

In fact, it was not until 1974 that the Equal Employment Opportunity Commission changed its standards to require *both* equal contributions *and* equal benefits (Decision No. 74-118, CCH EEOC Decisions Para. 6431 Employment Practices Guide, 1974).

If, as the Court noted in its opinion relative to the preliminary injunction herein, the EEOC Decision of 1974 (74-118) is entitled to great deference (*Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434, 9 S. Ct. 849, 3 FEP 175 (1971)), then surely prior to 1974 the administrative determinations of the Wage and Hour Administrator and the Office of Federal Contract Compliance were likewise entitled to great deference. That being the case, defendants should be allowed to establish such compliance as a matter of trial from all that was known to defendants during the period prior to Decision 74-118.

The Fair Labor Standards Act (including the Equal Pay Act of 1963) sets forth the equal pay requirements [29 U.S.C. §206 (d) (1)]:

"No employer shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . ." Any time an

employer pays the additional cost of funding extra retirement benefits due a female because of her longevity, he is automatically paying her a higher salary than her male counterpart. In order to comply with such Act, and in accordance with the cited ruling of the Wage and Hour Administrator, we submit the most appropriate procedure was that followed by the Department.

V

A DETERMINATION MUST BE MADE WHETHER DEFENDANTS' USE OF SEX-ORIENTED MORTALITY TABLES FITS WITHIN THE BONA FIDE OCCUPATION QUALIFICATION EXCEPTION OF TITLE VII

Section 703(e) of Title VII [42 U.S.C. §2000e-2(e)] states in pertinent part:

> "Notwithstanding any other provisions of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ."

While we recognize plaintiffs take the position that this "BFOQ" exception only applies to hiring (Statement of Reasons and Memorandum of Points and Authorities in Support of Preliminary Injunction, page 30), we know of no case that so holds. In fact, the case cited by plaintiffs in their motion for Summary Judgment, (*Chastang v. Flynn & Emerick Company*, 365 F.Supp. 957, 965, 6 FEP Cases 357 (D. Md. 1973) considered the application of the "BFOQ" exception to provisions of a retirement plan. The court

noted that pension plans were part of the compensation, terms and conditions of employment and analyzed the rationale for the plan's provisions under the "BFOQ" exception. While the court did not find the "BFOQ" requirements satisfied, it nevertheless applied them.

As noted in *Diaz v. Pan American World Airways, Inc.*, 442 F. 2d 385, 388 (5th Cir. 1971) cert. denied, 404 U.S. 950, 92 S. Ct. 275, 30 L.Ed. 2d 267 (1971), the bona fide occupational qualification exception is narrowly construed and turns upon the "business necessity" of the particular qualification. That is to say, discrimination based on sex is valid only when the essence of the business operation would otherwise be undermined (*Diaz, supra* p. 388).

The City Charter, of which the Court may take judicial notice, requires that the Department of Water and Power establish and maintain a retirement plan, which shall be maintained "in accordance with sound business practices and recognized actuarial methods." (Los Angeles City Charter Section 220.1)

Applying the "business necessity" test to defendants' Plan, we believe we can demonstrate the following:

1. No unisex actuarial table for the measurement of annuities existed at the time Title VII first became applicable to defendants, and none exists now (See Supplemental Affidavit of Harry M. Church).

2. Such a table works to the disadvantage of men as a group. (See Supplemental Affidavit of Harry M. Church).

3. Defendants' plan was based on providing the fairest benefits actuarially for all its employees at the fairest rates while maintaining sound financial condition. (See Supplemental Affidavit of Allan F. Larson)

VI

A VALID ECONOMIC PURPOSE EXISTS FOR THE DIFFERENCE IN CONTRIBUTION RATES BETWEEN MALE AND FEMALE EMPLOYEES

The underlying basis for the difference in contribution rates for female employees rests upon the actuarially established fact that female employees have a longer life expectancy than their male counterparts. The higher contribution rate attempts to maintain an equal economic benefit and burden to both sexes.

Courts have recognized that where a classification is based upon an "economic purpose" such as exists here, there is no discrimination under Title VII (Local 189, *United Papermakers and Paperworkers v. United States* (1969) 416 F.2d 980, 992). Defendants should be permitted the opportunity to prove the economic purpose and necessity herein.

VII

THE ACCURACY AND RESULTS OF DEFENDANTS' ACTUARIAL STATISTICS AND FINDINGS ARE TRIABLE ISSUES OF FACTS

Even if plaintiffs accept the fact that women live longer than men, they clearly do not concede that *all* women will live longer than *all* men. Thus, there is clearly a triable issue of fact that must be considered by this court, as well as any appellate court which may rule in the matter, regarding the results and validity of defendants' actuarial statistics and assumptions.

That life expectancy is a valid measure of a retirement plan, in and of itself, is impliedly recognized by Congress in the Age Discrimination in Employment

Act (29 U.S.C. §620 et seq.) enacted after Title VII. Section 4(f)(2) of said Act specifically provides:

> "It shall not be unlawful for an employer, (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension or insurance plan . . ."

It is obvious that Congress in permitting persons to be retired under a bona fide retirement plan, even though below the age protected under the Act, was aware that all such plans are funded and paid on an actuarial basis. (Parenthetically, we submit this exception is also further evidence, in addition to the legislative history set forth previously at pages 5-8 of defendants' Points and Authorities in Opposition to the Motion for Preliminary Injunction, of Congressional intent not to disturb the actuarial bases for retirement systems.)

In its Memorandum and Order Granting Plaintiffs' Motion for Preliminary Injunction, the Court noted that a particular Harvard Law Review Comment [84 Harv. L. Rev. 1109, 1172-1176] took the position that employers must provide the same life insurance benefits to male and female employees even though employers must pay higher premiums for males than for females due to actuarial female longevity. The Court then also noted that Congress intended to strike at the entire spectrum of disparate treatment of individual men and women resulting from sex stereotypes; that all stereotypic treatment of persons based on sex, whether rational or irrational was dead.

Surely, ignoring the fact of mortality probabilities is far more certain to result in disparate treatment of men and women than otherwise. If such is even

possibly the case, then defendants should be permitted to show the need for separate mortality tables to avoid actual stereotypic treatment. Otherwise, the result is a reverse discrimination in the sex discrimination area.

While it is true that the cost of paying for the additional years of benefits enjoyed by females under an equalized contribution rate, could be borne by the Plan, it must be apparent that such amounts to a higher level of pay to females.

VIII
OTHER ISSUES REMAIN TO BE DETERMINED

Finally, even the determination of damages, if due, is not a simple one. For example, under one provision of the "Plan", women who have resigned from service but left their contributions on deposit are able to obtain a "vested rights" retirement upon reaching retirement age. That retirement is measured by the total amount of contributions they and the Department have on deposit, i.e., a money purchase pension. If contributions are returned, these individuals will receive a smaller pension when they retire because they will have less money on deposit. (See Supplemental Affidavit of Allan F. Larson.)

Additionally, it is not clear this last class of plaintiffs is even properly represented by anyone with standing in this action. There is a question as to whether the unnamed plaintiffs in this class are even aware of the possible detrimental effect of a refund of contributions. Furthermore, this will also affect some active employees.

Of course, there is even a question whether awarding damages against defendants, an agency of local gov-

ernment, may not be a violation of the Eleventh Amendment to the Constitution, [*Edelman v. Jordan,* 415 U.S. 651, 94 S. Ct. 1347; 39 L.Ed.2d 662 (1974), *Fitzpatrick v. Bitzer,* 8 EPD ¶9685, p. 5878 (1974)] anyway.

CONCLUSION

It appears that both plaintiffs and defendants would benefit from a full presentation of the Plan and determination of the correctness of the actuarial assumptions upon which it is based. We therefore respectfully request that the plaintiffs' motion be denied.

DATED: May 15, 1975.

Respectfully submitted,

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power
DAVID J. OLIPHANT,
Deputy City Attorney

By /s/ David J. Oliphant
David J. Oliphant
Deputy City Attorney

111 No. Hope Street
P.O. Box 111
Los Angeles, California 90051
Attorneys for Defendants

United States District Court, Central District of California.

EXHIBIT A.

Affidavit of Harry M. Church.

[Title Omitted in Pringing]

State of California, County of Los Angeles—ss:

HARRY M. CHURCH, being duly sworn, deposes and says:

I am a partner in the firm of Coates and Crawford, Consulting Actuaries; I have continuously engaged in the actuarial consulting practice since 1952; I am an Associate of the Casualty Actuarial Society; Associate of the Society of Actuaries; Member of the American Academy of Actuaries; and Member of the Western Pension Conference; I am the consulting actuary for the Department of Water and Power Retirement Plan and have been since February 1, 1957; I also serve as consulting actuary to numerous other public retirement systems.

In my professional opinion, women live longer and have a greater life expectancy than men. The bases for my opinion are the following:

(1) I have personally conducted numerous statistical studies of male and female mortality including a number of studies conducted on Department of Water and Power employees—most recent of which was as of June 30, 1972. Each study involves a scientific determination of the probability of mortality of a determined group of individuals.

(2) Our firm has conducted numerous other mortality studies over a period of many years and I am cognizant of mortality studies conducted by others

throughout the nation. Mortality tables for annuity and pension purposes are established from and in accordance with such professionally conducted studies of mortality. All studies and mortality tables of which I am aware reflect the fact that women live longer than men.

(3) Every public retirement system in the State of California of which I am aware reflects the difference in mortality between men and women.

Sound actuarial practice requires that annuity or pension plans be based on averaging of life expectancies of persons in ascertained classes (usually age and sex) since the life expectancy of a specific person cannot be predetermined.

The Department of Water and Power Retirement Plan is designed to provide that female employees pay an equal proportion of the total cost of their benefits as male employees pay for theirs. The Plan is also designed to pay the same benefits per month to men and women; but because the life expectancy of women is longer, the total payout to women is greater. Because female employees of the Department live longer than male employees and the total payout to females is greater, it necessarily follows that female contribution rates must be higher than male contribution rates. However, if a man and woman each make equal monthly contributions during their working lives, then the return to each during their retired lives (i.e., the total of their respective pension allowances) will be substantially equal, with women receiving somewhat greater benefits.

In addition, the Plan provides four optional benefit programs which the employee may elect upon retirement. All four of these options provide both a greater monthly as well as total benefit to women than they provide to men.

With respect to surviving eligible spouse benefits that are available to both male and female employees, Department employees do not contribute for such benefits.

As a result of my most recent (1972) mortality study, the Board of Administration of the Retirement Plan adopted the 1951 Group Annuity Mortality Table. This table is published in the Transactions of the Society of Actuaries and is used extensively by both public and private retirement systems to reflect the mortality of retired lives. Consistent with other pension and annuity tables, this table provides separate tables for men and women.

Contribution rates of Department women are 14.84% higher than the contribution rates of men under the Retirement Plan. This factor was calculated by us and reflects the relationship between the life annuity values at age 65 for men and women based upon the 1951 group annuity mortality table.

If the female contribution rates to the Retirement Plan are reduced to the male contribution rate level and no additional changes are made, then the retirement plan will not be properly funded, i.e., assets on hand plus future contributions made to the Fund will not be adequate to provide the benefits that have been promised. In other words, the total actuarial liabilities of the Plan will exceed the total actuarial assets.

/s/ Harry M. Church
HARRY M. CHURCH

Subscribed and sworn to before me this 1st day of October 1974.

/s/ Inez P. Egan
Notary Public in and for the County of Los Angeles, State of California

[Seal]

United States District Court, Central District of California.

EXHIBIT B

Affidavit of Allan F. Larson.

[Title Omitted in Printing]

State of California, County of Los Angeles—ss:

ALLAN F. LARSON, being duly sworn, deposes and says:

I am the Administrator-Secretary for the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan; I am the custodian of all the records of the Plan; I have served as the Administrator-Secretary since June 1970, and for the five preceding years I served as the Assistant Administrator-Secretary; I have been an employee of the Department of Water and Power for more than 38 years.

A woman employee pays into the Retirement Fund approximately 14.84% more than a man entering the Retirement Plan at the same age. In addition to other Department payments to the Retirement Fund, the Department pays each month at the rate of 110% of the employee payments. For example, if a man contributes $1.00, the Department contributes $1.10 for his account. A woman who entered the Retirement Plan at the same age as the man would contribute $1.15 and the Department would contribute $1.26 for her account.

The preceding contribution ratios are necessary to satisfy the following basic design concepts of the Plan:

1. Women's monthly retirement allowances should equal those provided men with the same age

at employment and retirement and with the same Department service and salary history.

2. Women should contribute to the Retirement Fund the same proportion to the total moneys as contributed by men, required to pay their respective retirement allowances for their respective expected lives at retirement. As women live longer, they should contribute on a higher basis.

Periodic actuarial studies of the deaths of former employees receiving monthly service retirement pensions consistently disclose that Department women outlive Department men, and that this difference in average life expectancy is widening.

Based upon the general actuarial survey and evaluation of the Retirement Plan most recently completed on June 30, 1972, the Board of Administration adopted the "1951 Group Annuity Table" published in the transactions of the Society of Actuaries. This table has been adopted for Plan use in determining the total moneys which must be set aside for lifetime retirement allowances of employees upon their retirement. The table was adopted because it, better than other mortality tables, would have predicted the deaths of persons receiving service retirement pensions from the Plan.

To require that women contribute at the same rates as men and still provide that women receive the same monthly retirement allowance as men with no other changes to the Retirement Plan will result in improper funding of the Retirement Plan; this is, assets on hand plus future contributions made to the fund will not be adequate to provide the benefits that have been promised.

If the Department's monthly contributions to the Retirement Fund were increased by an amount equal to the difference between male and female present contribution rates, the Department's expected total retirement compensation for women retiring at age 65 (under formula retirement pensions) would be at least 17.5% greater than for men retiring at age 65. This difference is exclusive of cost of living adjustments which currently provide additional compensation to retirees. Since Department women live longer than Department men, they receive cost of living adjustments over a longer period than men. If 3% cost of living adjustments are granted each year, the Department's expected total contributions would be 30% greater for women than for men.

Alice F. Muller was appointed to the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan and attended her first meeting on January 25, 1968. She was then elected to serve a three-year term starting October 13, 1968. Ms. Muller filed a letter of resignation with the Board on December 19, 1968 (a copy of that letter is attached hereto).

Carolyn Mayshack's annual salary, based on 2088 hours a year, is $11,784. On an hourly basis, this is equivalent to $5.644 per hour. Her monthly salary, based on 174 hours, is $982. Ms. Mayshack is paid every two weeks or for an 80-hour work period. For a four-week period, or 160 hours, she would gross $903.04.

Federal and state income taxes are withheld from Ms. Mayshack on the basis of her being married and claiming one exemption (herself). The federal income tax withheld for each two-week pay period is $67.13;

the state income tax withheld is $7.49. If Ms. Mayshack were to claim an exemption for herself and two dependents, the amount of income taxes withheld would be $55.20 and $4.80 for federal and state respectively.

Contributions to the Retirement, Death and Disability Funds are deducted from twelve of the twenty-six bi-weekly pay period checks per year. For Ms. Mayshack, a total of $57.23 a month is deducted. Of this amount $6.14 is contributed to the Disability Fund; $3.51 is contributed to the Death Benefit Fund, and $47.58 is contributed to the Retirement Fund. Her male counterpart would pay $41.44, or $6.14 less than Ms. Mayshack, to the Retirement Fund, and he would pay identical amounts as Ms. Mayshack to the other two funds.

Ms. Mayshack's "take-home pay" after withholding for federal and state income taxes and contributions to the three funds averages $704.39 for a four-week period (160 hours) and is $762.41 for a monthly period (174 hours). If Ms. Mayshack were to claim two additional exemptions for her dependents, her take-home pay would be $733.63 for a four-week period and $794.27 for a monthly period.

/s/ Allan F. Larson
ALLAN F. LARSON

Subscribed and sworn to before me this 11th day of October 1974.

/s/ Sylvia F. Hoffman
Notary Public in and for the County
of Los Angeles, State of California

[Seal]

December 17, 1968

The Board of Administration
Water and Power Employees
Retirement Plan
Building

Gentlemen:

With regret I tender my resignation as a member of the Board of Administration of the Retirement Plan, effective immediately. I have been appointed to a new position in the Power System, and will be unable to continue as a Board member.

Though I have long dreamed of working on a power construction project, my appointment to such a job seemed outside the realm of possibility, even as recently as the Retirement Board election. I apologize for the break in continuity my resignation is causing, but I feel that I must give all my energy and attention to my new job—and it is only fair that the employees in the Joint Group be represented by one of their own.

It has been a pleasure and a valuable experience to serve on the Board, and I shall miss it, and each of you, more than you can imagine. I leave you, knowing that our Retirement Plan is well-administered, and that my bright and not-too-distant future as a retired employee is in the hands of a Board that is earnest, knowledgeable, and progressive.

Sadly,
/s/ Alice Muller

Mr. Benson moved that Miss Muller's resignation be accepted with regret. Mr. Nystrom seconded the motion.

Ayes: Members: Benson, Luhring, Nystrom, Kanouse, Sachau, Mullin

Noes: None

—Letter attachment
LARSON Affidavit—

United States District Court, Central District of California.

EXHIBIT C

Supplemental Affidavit of Harry M. Church.

Marie Manhart, et al., Plaintiffs, vs. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil Action No. 73-2272-HP.

State of California, County of Los Angeles—ss:

HARRY M. CHURCH, being duly sworn, deposes and says:

I am the consulting actuary for the Department of Water and Power Retirement Plan and have been since February 1, 1957. This affidavit is supplemental to my previous affidavit filed with the Court and subscribed and sworn to by me on the 11th day of October 1974.

In my professional opinion, the plaintiffs in this lawsuit suffered no financial losses as a result of being required to pay a higher contribution rate than their male counterparts because under the Department's Retirement Plan men and women of the same age pay the same proportion of their total expected benefits.

The Plan funds the cost of benefits, like all annuity plans, based upon the life expectancy of its beneficiaries. Life expectancy and mortality tables are universal throughout the western commercial world in separating male mortality rates from female mortality rates. As recently as 1971, the Society of Actuaries published mortality tables which separate males from females in measuring life expectancy.

To my knowledge, no tables have yet been developed which measure life expectancy for annuity purposes

on a unisex basis. To use unisex mortality tables could lead to a result which adversely affects the financial integrity of an annuity or pension system such as the Department of Water and Power Retirement System.

When you reduce female contribution rates to the same as male, with the same monthly benefits, the employer must make up the difference in cost of the plan. This obviously works to the detriment of the male employee in that the employer is, in effect, providing more money for females that retire than males that retire.

/s/ H. M. Church
HARRY M. CHURCH

Subscribed and sworn to before me this 15th day of May 1975.

/s/ Inez P. Egan
Notary Public in and for the County
of Los Angeles, State of California

[Seal]

United States District Court, Central District of California.

EXHIBIT D

Supplemental Affidavit of Allan F. Larson.

Marie Manhart, et al., Plaintiffs, vs. City of Los Angeles, Department of Water and Power, et al., Defendants. Civil Action No. 73-2272-HP.

State of California, County of Los Angeles—ss.

ALLAN F. LARSON, being duly sworn, deposes and says:

I am the Administrator-Secretary for the Board of Administration of the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan (hereafter "Plan"). This affidavit is supplemental to my previous affidavit filed with the Court and subscribed and sworn to by me on the 11th day of October 1974.

I am familiar with and fully understand the operation of the Retirement Plan, being responsible therefor as its Administrator-Secretary.

In my opinion, due to the actuarial bases of the Plan, none of the plaintiffs suffered any monetary losses as a result of paying a higher contribution rate to the Retirement Fund during the period from March 24, 1972 through December 31, 1974 and prior thereto.

If called as a witness, I will introduce, outline and explain the retirement provisions of the Plan and show that they were designed to treat men and women equally in all phases during the period for which damages are sought; that certain provisions appear to favor men and other women, as a result of the use of separate mortality tables but that in fact those provisions

are designed to, and do, provide equal treatment in the ultimate benefits for both.

Under the "vested rights" retirement provisions of the Plan, a person with more than one year's service may resign from the Department and leave his contributions on deposit until normal retirement age, when he may receive a retirement allowance based upon his total contributions on deposit and the Department's 110% matching funds. To the extent contributions are returned to him now that allowance must be reduced.

/s/ Allan F. Larson
ALLAN F. LARSON

Subscribed and sworn to before me this 15th day of May 1975

/s/ Sylvia F. Hoffman
Notary Public in and for the
County of Los Angeles, State of
California

[Seal]

[Affidavit of Service Omitted in Printing]

United States District Court, Central District of California.

Findings of Fact and Conclusions of Law.

[Title Omitted in Printing]

Filed: June 20, 1975.

On May 29, 1975, plaintiffs' motion for summary judgment was heard by the court. Having considered the pleadings, affidavits, and papers on file and the oral arguments of counsel, the court being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

It is true that:

1. The plaintiffs, Carolyn Mayshack, Margerie Stoop, Alice F. Muller and Ethel L. Lehman, are employees of the defendant, Department of Water and Power of the City of Los Angeles ("Department"). The plaintiff, Marie Manhart, is a former employee of the Department. The plaintiff, Committee to Protect Women's Retirement Benefits, is an association of female, supervisory employees of the Department. The plaintiff, International Brotherhood of Electrical Workers, Local Union No. 18 ("Union"), is an unincorporated labor organization, whose members include certain women who are employed by the Department.

2. The defendant, Department of Water and Power of the City of Los Angeles, employs approximately 2,000 females. The defendant, Board of Commissioners of the Department of Water and Power, directs the affairs of the Department. The defendant, Board of Administration of the Department of Water and Power Public Employees' Retirement, Disability, and Death

Benefit Insurance Plan, administers the benefit plans maintained for employees of the Department.

3. The Department maintains a Public Employees' Retirement, Disability, and Death Benefit Insurance Plan ("Plan"). The Plan is funded by compulsory employee contributions which are matched 110% by compulsory employer contributions. The Plan is also funded by earnings on all contributions.

4. Between March 24, 1972 and December 31, 1974, the Plan paid the same monthly benefits to male and female retirants of the same age and length of service. However, higher contributions were required of female employees than males because actuarial tables used in the administration of the Plan indicate that women in general live longer than men and that women would therefore tend to collect monthly payments for a longer period of time.

5. On or about June 5, 1973, the Union filed with the Equal Employment Opportunity Commission ("EEOC") a charge alleging that the Plan discriminated against females because it required them to contribute more than their male counterparts. The United States Department of Justice issued a notice of right to sue letter on or about September 17, 1973. The plaintiffs filed a complaint in this court on September 26, 1973.

6. The plaintiffs employed legal counsel, who rendered valuable services to the classes in the litigation of the issues presented in this case.

7. On April 5, 1972, the EEOC amended its regulations to state: "It shall not be a defense under Title [VII] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 C.F.R. 1604.9(e).

The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this court to be true in all respects.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the plaintiffs' action which was brought pursuant to Section 706(f) of Title VII of the Equal Employment Opportunity Act of 1972 ("Act") (42 U.S.C. § 2000e-5(f)).

2. The plaintiff Union filed a timely charge with the EEOC. After receiving a notice of right to sue letter from the United States Department of Justice, the plaintiffs filed a timely complaint in this court. The plaintiffs have satisfied the jurisdictional prerequisites of the Act for bringing suit in this court.

3. The Department is an employer within the meaning of Section 701(b) of the Act (42 U.S.C. § 2000e (b)).

4. With respect to the cause of action brought under Title VII of the Act, on January 25, 1974, the court certified classes which included (a) all female employees presently working for the Department who are members of the Plan, (b) all female members of the Plan who retired from the active service with the Department on or after March 24, 1972, (c) all female employees who resigned from active service with the Department on or after March 24, 1972 and who left their compulsory employee contributions on deposit with the Plan, and (d) all women hired by the Department who became members of the Plan prior to the resolution of this action.

5. The Department's practice of requiring females to make larger monthly contributions to the Plan than their male counterparts is an unlawful employment

practice within the meaning of Section 701(a)(1) of the Act (42 U.S.C. § 2000e-2(a)) and no defenses under Section 703(e) and (h) of the Act have been stated (42 U.S.C. § 2000e-2(e), (h)).

6. The Eleventh Amendment to the United States Constitution does not bar a money recovery against the defendants in this action.

7. The defendants' should have been placed on notice that their practice of differential contributions constituted an unlawful employment practice under Section 701(a)(1) of the Act when the EEOC amended its regulations on April 5, 1972 to include what is now 29 C.F.R. 1604.9(e).

8. Under Section 706(g) of the Act, each member of the classes defined in Paragraph 4 of these Conclusions of Law is entitled to a refund measured by the difference between the contributions she was required to make on and after April 5, 1972 and the contributions required of a male who entered the service of the Department at the same age, and on the same date, and earned the same rate of pay throughout his service as the female member of the class. In addition, each member of the class is entitled to interest at seven percent (7%) on her overpayments running from the date of contribution.

9. Counsel for the plaintiffs are entitled by Section 706(k) of the Act (42 U.S.C. § 2000e-5(k)) to reasonable attorneys' fees payable by the defendants.

Dated: June 20, 1975.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

United States District Court, Central District of California.

Notice of Entry.

Marie Manhart, et al., Plaintiff vs. City of Los Angeles, Department of Water and Power, etc. et al., Defendant. Case Number 73-2272-HP.

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEYS OF RECORD:

You are hereby notified that JUDGMENT in the above entitled case was entered in the docket on June 20, 1975.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (*After* sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

[Certificate of Mailing Omitted in Printing]

United States District Court, Central District of California.

Judgment.

[Title Omitted in Printing]

Filed: June 20, 1975.

On May 29, 1975, plaintiffs' motion for summary judgment was heard by the court. Today, the court has filed its findings of fact and conclusions of law. Accordingly,

IT IS ORDERED AND ADJUDGED:

That the practice of the Department of Water and Power of the City of Los Angeles ("Department") which requires female employees to make larger monthly contributions to the Department of Water and Power Employees' Retirement, Disability, and Death Benefit Insurance Plan ("Plan") than their male counterparts is an unlawful employment practice within the meaning of Section 701 (a)(1) of the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-2(a));

That defendants are permanently enjoined from requiring female employees to make larger contributions to the Plan than their male counterparts;

That (a) each female employee presently working for the Department who is a member of the Plan, (b) each female member of the Plan who retired from active service with the Department on or after March 24, 1972, (c) each female who resigned from active service with the Department on or after March 24, 1972 and who left her compulsory employee contributions on deposit with the Plan, and (d) each female hired by the Department who became a member of the Plan prior to the resolution of this action,

shall be refunded such portion of her contributions made on and after April 5, 1972 which exceeded the contributions of her male counterpart who entered the service of the Department at the same age and on the same date, and earned the same rate of pay throughout his service as the female employee. In addition, each such female employee shall be entitled to interest at seven percent (7%) on her overpayments running from the date of contribution;

That the defendants pay counsel for the plaintiffs reasonable attorneys' fees; and

That each side bear its own costs of suit.

Dated: June 20, 1975.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

United States District Court, Central District of California.

Notice of Appeal.

[Title Omitted in Printing]

Filed: July 7, 1975.

NOTICE IS HEREBY GIVEN that CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS, defendants above named, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on June 20, 1975.

Dated: July 29, 1975

BURT PINES, City Attorney
EDWARD C. FARRELL, Chief Assistant City Attorney for Water and Power
/s/ By David J. Oliphant
DAVID J. OLIPHANT
Deputy City Attorney
Attorneys for Defendants
111 North Hope Street
P. O. Box 111
Los Angeles, California 90051
481-6378

United States Court of Appeals, for the Ninth Circuit.

Marie Manhart, et al., Plaintiffs-Appellees, vs. City of Los Angeles, Department of Water and Power, a body corporate and politic, et al., Defendants-Appellants. No. 75-2729, No. 75-2807, No. 75-2905.

Opinion and Order of United States Court of Appeals filed November 23, 1976, amended December 23, 1976. Reprinted as Appendix C to Petition for Writ of Certiorari.

United States Court of Appeals, for the Ninth Circuit.

[Docket Entries—Title Omitted in Printing.]

Petition for Rehearing and Suggestion that Rehearing be In Banc in the United States Court of Appeals filed December 9, 1976.

Received letter dated December 14, 1976 regarding appellants' additional citations December 16, 1976

Order.

The opinion filed in this case on November 23, 1976, is withdrawn, and an amended opinion, accompanying this order, is ordered filed *nunc pro tunc* as of November 23, 1976.

The court requests that counsel for plaintiffs-appellees shall file, within fourteen days from the date of the filing of this order, a response to the petition for a rehearing and suggestion that rehearing be in banc that was filed on December 9, and to the letter of counsel for appellants that was received by the Clerk on December 16, 1976, with particular reference to the effect, if any, of the decision of the Supreme Court in the case of *Gilbert v. General Electric Company*, Supreme Court No. 74-1589, decided December 7, 1976. Order issued December 23, 1976.

Appellees Reply to Petition for Rehearing filed January 17, 1977.

United States Court of Appeals, for the Ninth Circuit.

[Title Omitted in Printing]

Opinion and Dissenting Opinion of the United States Court of Appeals on Rehearing filed April 18, 1977. Printed as Appendix D to Petition for Writ of Certiorari.

Supreme Court of the United States, Office of the Clerk, Washington, D.C. 20543.

Order Granting Certiorari.

October 3, 1977.

Edward C. Farrell, Esq.
Chief Assistant City Attorney

111 N. Hope Street
P. O. Box 111
Los Angeles, California 90051

Re: City of Los Angeles, Department of Water and Power, et al. v. Marie Manhart, et al.
No. 76-1810

Dear Mr. Farrell:

The Court today took the following action in the above case:

The petition for a writ of certiorari is granted.

Enclosed are memorandums describing the time requirements and procedures under the rules of this Court.

The additional docketing fee of $50, Rule 52(a), is due and payable.

Counsel are admonished that since this case must be ready for argument during the January session of Court, no extensions of time will be granted except in the most extraordinary circumstances.

Very truly yours,

/s/ Michael Rodak, Jr.
Michael Rodak, Jr.
Clerk

Enclosures
AIR MAIL